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BY
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TO
THE RIGHT HONOURABLE
JAMES LORD WENSLEYDALE,
LATE ONE OF THE
BARONS OF HER MAJESTY'S COURT OF EXCHEQUER,
TO WHOM
THE LAW AND ITS PROFESSORS ARE UNDER OBLIGATIONS
AS GREAT AS TO ANY JUDGE WITHIN LEGAL MEMORY,
THIS WORK
IS,
WITH HIS PERMISSION,
Affectionately Inscribed
BY
THE AUTHOR.

PREFACE

TO THE SIXTEENTH EDITION.

THE Editors have endeavoured to include the recent cases and statutes in this Edition, but the Finance Act of 1899, c. 9, did not become law till June 20th. By sect. 4 of that Act marketable securities that now escape duty (*i.e.*, not made or issued or bearing interest here), are, if negotiated after August 1st, to bear a stamp duty of 1s. in the 10l. By sect. 10 (1) the stamp on bills of over 50l. drawn and payable abroad, if paid or negotiated here, is reduced to 6d. in the 100l.; and by sect. 10 (2) the stamp on all bills payable not more than three days after date or sight is to be 1d. A rate of exchange for foreign currencies is also given in the Schedule, but that does not apply even for the purposes of the Stamp Act to bills or notes [*vide* sect. 12 (1), Act of 1899] which are (unless otherwise stipulated) calculated according to the rate for sight drafts of the day. Code, s. 72 (4) and 57 (2).

MAURICE BARNARD BYLES.

WALTER JOHN BARNARD BYLES.

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PREFACE

TO THE FOURTEENTH EDITION.

THE Act to Codify the Law relating to Bills of Exchange, Cheques and Promissory Notes (45 & 46 Vict. c. 61) came into operation on the 18th of August, 1882, and introduced (with the exception of two sections, 53 (2) and 100) one uniform law for the whole of the United Kingdom.

As implied by the title, the changes introduced by the Act are not very numerous, the principal being—the recognition of the inherent negotiable quality of bills or notes even without the words “order or bearer,” unless there be words prohibiting transfer or indicating that intention; and the equitable distribution of the loss occasioned by overholding a cheque when the bank fails in the interim. The holder of an office, for the time being, may now be payee, and payees may be entitled in the alternative; an indorsement may be conditional, but the party paying may disregard the condition. The duties of the holder with regard to presentment for acceptance, presentment for payment, notice of dishonour, and qualified acceptance, are clearly and amply set forth. A renunciation at maturity, to be a discharge of the bill, must be in writing, or the bill be delivered up. The rule, that the appointment of a debtor as executor operated as a release, had been already overridden in Equity, but it may be impliedly repealed by Section 61. Cheques are not necessarily inland, though, unless the contrary appear on their face, they may be treated as inland, as

may all other bills or notes not showing the contrary. Restrictive indorsements and qualified acceptances are fully recognized; an acceptance, without more, of a bill *drawn* payable at a particular place being (as before) a general acceptance, so that the acceptor is liable even without presentment there, though not so the drawer and indorsers; but if the bill be *accepted* payable at a particular place, which requires presentment there to render the acceptor liable at all, a presentment there, too late to charge the drawer and indorsers, will yet charge the acceptor, in the absence of an express stipulation to the contrary.

Reasonable time within which to present a bill on demand, so as to charge the drawer or indorsers, is declared to be a mixed question of law and fact; but unreasonable time, after which an innocent transferee of such an instrument is affected with defects of title of which he had no notice, is made a question of fact only. Accommodating parties become liable as soon as value is given, and notice is immaterial. A non-apparent alteration will not affect a holder in due course.

In this Edition the chronological order has been followed: thus, the first ten Chapters are devoted to a description of the instrument, the next two to the title of the holder, the following six to his duties, and the remainder to his rights, how they may be lost or qualified, or enforced by action or proof in bankruptcy. The substance of each section of the Code appears in its appropriate place in the text, but the whole Act is given in the Appendix.

MAURICE BARNARD BYLES.
ARCHIE KIRKMAN LOYD.

TEMPLE,
June 1st, 1885.

PREFACE

TO THE FIRST EDITION.

THERE is no vestige of the existence of bills of exchange* among the ancients, and the precise period of their introduction is somewhat controverted. It is, however, certain that they were in use in the fourteenth century. Indeed,

* Il n'y a aucun vestige de notre contrat de change, ni des lettres de change, dans le droit Romain. Ce n'est qu'il n'arrivât quelquefois chez les Romains, que l'on comptât pour quelqu'un une somme d'argent dans un lieu à une personne, qui se chargeoit de lui en faire compter autant dans un autre lieu. Ainsi nous voyons, dans les lettres de Cicéron à Atticus, que Cicéron voulant envoyer son fils faire ses études à Athènes, s'informe si pour épargner à son fils de porter lui-même à Athènes l'argent dont il y auroit besoin, on ne trouveroit pas quelque occasion de le compter, à Rome, à quelqu'un qui se chargeroit de le lui faire compter à Athènes.—*Epist. ad Att.* xii. 24 ; xv. 25. Mais cela n'étoit pas la négociation de lettres de change telle qu'elle a lieu parmi nous ; cela se faisoit par de simples mandats. Cicéron chargeoit quelqu'un de ses amis de Rome qui avoit de l'argent à recevoir à Athènes, de faire tenir de l'argent à son fils à Athènes ; et cet ami, pour exécuter le mandat de Cicéron, écrivoit à quelqu'un des débiteurs qu'il avoit à Athènes, et le chargeoit de compter une somme d'argent au fils de Cicéron. Au reste, on ne voit point qu'il se pratiquât chez les Romains, comme parmi nous, un commerce de lettres de change : et nous trouvons au contraire, en la loi 4, § 1, ff. *de naut. Fœn.*, qui est de Papinien, que ceux qui prêtoient de l'argent à la grosse aventure aux marchands qui trafiquoient sur mer, envoyoient un de leurs esclaves pour recevoir de leur débiteur la somme prêtée lorsqu'il seroit arrivé au port où il devoit vendre ses marchandises ; ce qui certainement n'aurait pas été nécessaire, si le commerce des lettres de change eût été en usage chez les Romains.

Quelques auteurs ont prétendu que l'usage du contrat de change et des lettres de change est venu de la Lombardie, et que les Juifs, qui y étoient établis, en ont été les inventeurs : d'autres en attribuent l'inven-

they are mentioned as “ *letteres d’eschange* ” in the English Statute Book (3 Ric. 2, c. 3), as early as the year 1379; though we find in our English reports no decision relating to them earlier than the reign of James the First.*

It is probable that a bill of exchange was, in its original, nothing more than a letter of credit from a merchant in one country, to his debtor, a merchant in another, requesting him to pay the debt to a third person, who carried the letter, and happened to be travelling to the place where the debtor resided. It was discovered by experience, that this mode of making payments was extremely convenient to all parties:—to the creditor, for he could thus receive his debt without trouble, risk or expense—to the debtor, for the facility of payment was an equal accommodation to him, and perhaps drew after it facility of credit—to the bearer of the letter, who found himself in funds in a foreign country, without the danger and incumbrance of carrying specie. At first, perhaps, the letter contained many other things besides the order to give credit. But it was found that the original bearer might often, with advantage, transfer it to another. The letter was then disencumbered of all other matter; it was open and not sealed, and the paper on which it was written gradually shrank to the slip now in use. The assignee was, perhaps, desirous to know, beforehand, whether the party, to whom it was addressed, would pay it, and sometimes showed it to him for that purpose; his promise to pay was the origin of acceptances.

tion aux Florentins, lorsqu’ayant été chassés de leur pays par la faction de Gibelins, ils s’établirent à Lyon et en d’autres villes. *Il n’y a rien sur cela de certain, si ce n’est que les lettres de change étoient en usage dès le quatorzième siècle.* C’est ce qui paroît par une loi de Venise de ce temps sur cette matière, rapportée par Nicholas de Passeribus, en son livre, *De Script. Privat.* lib. 3.—*Pothier, Traité du Contrat de Change, Partie Prem., Chap. 1, s. 1.*

* *Martin v. Boure*, Cro. Jac. 6.

These letters or bills, the representatives of debts due in a foreign country, were sometimes more, sometimes less, in demand; they became, by degrees, articles of traffic; and the present complicated and abstruse practice and theory of exchange was gradually formed.

Upon their introduction into our own country, other conveniences, as great as in international transactions, were found to attend them. They offered an easy and most effectual expedient for eluding the stubborn rule of the common law, that a debt is not assignable; furnishing the assignee with an assignment binding on the original creditor, capable of being ratified by the debtor, perhaps guaranteed by a series of responsible sureties, and assignable still further, *ad infinitum*. Not only did these simple instruments transfer value from place to place, at home or abroad, and balance the accounts of distant cities without the transmission of money; not only did they assign debts in the most convenient, extensive and effectual manner; but the value of the debt was improved by being authenticated in a bill of exchange, for it was thus reduced to a certain amount, which the debtor, having accepted, could not afterwards unsettle; evidence of the original demand was rendered unnecessary, and the bill afforded a plainer and more indisputable title to the whole debt. A creditor, too, by assigning to a man of property a bill at a long date, given him by his debtor, could obtain, for a trifling discount, his money in advance. Credit to the buyer was thus rendered consistent with ready money to the seller, and the reconciliation of the apparent inconsistency was brought about by a further benefit to a third person, for it was effected by advantageously employing the surplus and idle funds of the capitalist. At the first introduction of bills of exchange, however, the English Courts of Law regarded them with a jealous and evil eye, allowing them only

between merchants; but their obvious advantages soon compelled the Judges to sanction their use by all persons; and of late years the policy of the Bench has been industriously to remove every impediment, and add all possible facilities to these wheels of the vast commercial system.

The advantages of a bill of exchange in reducing a debt to a certainty, curtailing the evidence necessary to enforce payment, and affording the means of procuring ready money by discount, often induced creditors to draw a bill for the sake of acceptance; though there might be no intention of transferring the debt. Such a transaction pointed out the way to a shorter mode of effecting the same purpose by means of a promissory note. Promissory notes soon circulated like bills of exchange, and became as common as bills themselves. Notes for small sums, payable to bearer on demand, were found to answer most purposes of the ordinary circulating medium, and have at length, in all civilized countries, supplanted a great portion of the gold and silver previously in circulation. Great, however, as was the saving, and numerous the advantages arising from the substitution, it was discovered by experience that the dangers and inconveniences of an unlimited issue of paper money were at least as great. The Legislature, have, therefore, found it necessary to place the issue of negotiable notes for small sums under the restrictions which will be pointed out in this work; and experience has proved that the only mode of preserving paper money on a level with gold, is to compel the utterers to exchange it for gold, at the option of the holder. And peradventure even then, unless the State control the issue of paper, on principles controverted and imperfectly understood at present, the value of the whole circulating medium may decline together, as compared with other commodities or the currency of foreign countries, and the consequent tendency of the

precious metals to leave the kingdom may, by narrowing the basis of the currency, endanger the whole superstructure.

During the suspension of cash payments and the circulation of one pound notes, nearly every payment in this country was made in paper. And some idea may be formed of the immense amount of property now afloat in bills and notes, when it is considered that all payments for our immense exports and imports, almost every remittance to and from every quarter of the world, nearly every payment of large amount between distant places in the kingdom, and a large proportion of payments in the same place, are made through the intervention of bills; not to mention the amount of common promissory notes, at long and short dates, the notes of the Bank of England and country banks, and the universal and daily increasing use of cheques. It will not, perhaps, be an unreasonable inference that the bills and notes of all kinds, issued and circulated in the United Kingdom in the space of a single year, amount to many hundred millions.

Simple as the form of a bill or note may appear, the rights and liabilities of the different parties to those instruments have given rise to an infinity of legal questions, and multitudes of decisions—a striking proof of what the experience of all ages had already made abundantly manifest,—that law is, in its own nature, necessarily voluminous; that its complexity and bulk constitute the price that must be paid for the reign of certainty, order, and uniformity; and that any attempt to regulate multiform combinations of circumstances by a few general rules, however skilfully constructed, must be abortive.

In France this subject has been briefly but luminously treated, first by Dupuy de la Serra, in a little book entitled “*L’Art des Lettres de Change*,” and afterwards by Pothier,

whose work as well as his other performances, and in particular the *Traité des Obligations*, evinces a profound acquaintance with the principles of jurisprudence, and extraordinary acumen and sagacity in their application ; the result of the laborious exercise of his talents on the Roman law. There cannot be a greater proof of the surpassing merit of his works, than that, after the lapse of more than half a century, and a stupendous revolution in all the institutions of his country, many parts of his writings have been incorporated, word for word, in the new Code of France. The *Traité du Contrat de Change* is often cited in the English Courts of Law. “The authority of Pothier,” says the present learned Chief Justice* of the Common Pleas, “is as high as can be had next to the decision of a Court of Justice in this country ; his writings are considered by Sir William Jones as equal, in point of luminous method, apposite examples, and a clear manly style, to the works of Littleton on the Laws of England.”†

In this country, the growth of the law on bills and notes has been almost proportionate to the increase of those instruments ; insomuch that within the last sixty years the reported decisions upon them, in law, equity, and bankruptcy, would fill many volumes. Numerous have been the attempts to reduce the mass of authorities to the shape of a regular treatise ; but amongst all these, two only are now in common use in the Profession, the treatise of Mr. Chitty, and the summary of Mr. Justice Bayley.‡

* Lord Chief Justice Best.

† *Cox v. Troy*, 5 B. & A. 481. There is now also an able modern French work on the same subject by M. Nougier. In America have recently appeared the Commentaries of Mr. Justice Story on the Law of Bills of Exchange, and his Commentaries on the Law of Promissory Notes.

‡ Mr. Roscoe's Digest and Mr. Johnson's book had not appeared when these observations were written.

The work of the learned Judge is written with the greatest circumspection; but it is now out of print, and the latest edition some years old.*

Mr. Chitty's treatise is a laborious and full collection of almost all the cases, by an eminent counsel, the extent of whose legal acquirements, and the readiness of their application, can only be appreciated by those who have been in the habit of personal intercourse with him. But the size of the book is an objection with many, and a cloud of authorities will sometimes obscure the most luminous arrangement.

This little work does not aspire to compete with either of the above learned performances, but merely to supply a want, felt by many, of a plain and brief summary of the principal practical points relating to bills and notes, supported by a reference to the leading or latest authorities. In many cases, the reader will, however, find the law laid down in the very words of the judgment, a plan which the Author has been induced to adopt, partly that those who may not have ready access to the authorities may be satisfied that the law is correctly stated; and partly because he distrusted his own ability to enunciate, on so complicated a subject, a general rule, neither too narrow nor too wide, beset, as almost all such general rules now are, with numerous qualifications and exceptions. No pains have been spared to render the subject intelligible. How far the book is likely to be useful in practice, it is for others to determine.

JOHN BARNARD BYLES.

INNER TEMPLE,
16th April, 1829.

* A new edition has since been published.

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(18)	99, 261, 341.	(46)	20, 245, 248, 273, 275, 280, 281, 289, 293, 294, 295, 419.
(19)	14, 101, 102, 216, 263, 264, 265, 289.	(47)	21, 226, 233, 295.
(20)	90, 95, 96, 99, 100, 145, 195, 259, 341, 346.	(48)	27, 145, 216, 225, 244, 295.
(21)	2, 6, 102, 115, 145, 175, 178, 179, 182, 259, 262, 264, 266, 267, 397, 398, 420.	(49)	200, 225, 226, 229, 230, 233, 234, 235, 236, 237, 238, 239, 241, 242, 245, 353.
(22)	38, 70, 71, 79, 81, 180, 271, 407.	(50)	27, 225, 241, 244, 245, 248, 249, 250, 251, 273, 419.
(23)	38, 46, 52, 178, 256, 409.	(51)	17, 27, 139, 216, 217, 218, 219, 220, 222, 249, 263, 277, 295, 439.
(24)	39, 41, 58, 192, 298.	(52)	14, 239, 242, 258, 265, 280, 287, 289, 293, 302, 307.
(25)	44.	(53)	19, 21, 25, 46, 256, 383, 403.
(26)	42, 45, 67, 84.	(54)	41, 96, 145, 259, 263, 271, 480.
(27)	48, 143, 144, 145, 150, 154, 193, 197, 202, 279.		
(28)	143, 154, 155, 197, 279, 323, 328.		
(29)	2, 55, 97, 143, 144, 145, 146, 147, 170, 197, 198, 296, 342, 395.		

Sect.		Sect.	
(55)	41, 145, 181, 182, 183, 299, 437.	(73)	16, 27.
(56)	41, 42, 109, 145, 174, 175, 182, 195, 258, 266, 339, 421.	(74)	19, 21, 280, 284, 403.
(57)	181, 182, 221, 333, 431, 438, 439, 440, 441, 442, 443, 445, 452.	(75)	20, 207.
(59)	96, 131, 147, 183, 184, 200, 201, 202, 296, 299, 300, 302.	(76)	30.
(60)	28, 41, 147, 257, 350.	(77)	30.
(61)	64, 202, 267, 302, 314.	(78)	30, 32, 342, 344.
(62)	102, 145, 203, 270, 302, 317.	(79)	19, 30, 31, 147, 403.
(63)	183, 267, 268, 317, 396.	(80)	30, 31, 147.
(64)	32, 90, 145, 174, 187, 337, 340, 341, 342.	(81)	30, 32.
(65)	15, 216, 222, 257, 274, 275, 278, 284, 295.	(82)	31, 32, 147.
(66)	216, 274, 278, 295.	(83)	6, 7, 13, 103, 285.
(67)	216, 274, 275, 276, 295.	(84)	2, 6, 178.
(68)	216, 258, 274, 275, 278, 295, 309, 310, 399, 439.	(85)	8.
(69)	378, 392, 395, 421.	(86)	13, 14, 198, 199, 280, 281, 285, 286.
(70)	378, 392, 395, 396, 421, 460.	(87)	14, 101, 280, 288, 293.
(71)	136, 137, 138, 266.	(88)	14, 96, 145.
(72)	17, 92, 203, 282, 383, 384, 385, 387, 389.	(89)	2, 6, 7, 13, 14, 15, 91, 218, 225, 242, 258, 283, 341, 342, 355, 396.

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39, 79.

21, 233, 236.

219.

218.

32, 80.

98.

32, 80, 117, 131, 174, 311, 320, 341, 460.

ERRATA.

- ✓ Page 46, line 7, *for* "consistent" *read* "inconsistent."
- ✓ Page 221, *omit* note (b) " Vide Appendix."
- ✓ Page 264, line 20, *for* "admissible" *read* "inadmissible."

Unconditional. a cheque had at back for endorsement "Recd.... - being my share of the second & final bonus &c." Held unconditional, as words not addressed to banker. *Nathan v. Ogden & Co Ltd* (1905) 93 L. T. 553.

BILLS OF EXCHANGE.

CHAPTER I.

GENERAL OBSERVATIONS ON A BILL OF EXCHANGE.

<i>Explanation of Terms</i>	1	<i>How far Bills and Notes are considered as Chattels</i>	4
<i>Peculiar Qualities of Contracts on Bills or Notes</i>	3	<i>May be taken in Execution</i>	4
<i>Effect of drawing or indorsing a Bill</i>	4	<i>Formerly might have had a Testamentary Operation</i>	5
		<i>As a Declaration of Trust</i>	5

CHAPTER I.

A BILL of Exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person, to whom it is addressed, to pay on demand; or at a fixed or determinable future time; a sum certain in money to, or to the order of, a specified person or to bearer (a).

No precise form of words is essential to the validity of a bill of exchange, provided it substantially complies with the above definition (b); but it must be an unconditional order (though it may be accepted conditionally), and it must not order any act to be done in addition to the payment of money, or it will not be a bill of exchange (c).

The sum is certain within the above definition though it

Explanation of terms.

(a) A draft by a country branch of a bank on the head office is not a B/E. Capital & Counties Bank v. Gordon [1903] A.C. 240. An order for the payment of money, crossed, payable only on signature of the holder of receipt for it, is not a B/E. ib.

(a) Code, s. 3. It is said that it was formerly essential in a bill of exchange that it should be drawn in one place and payable in another; no such requisite now exists by the law of England, or in most of the continental Codes, and the "remise de place en place" has disappeared from the French.

(b) *Chadwick v. Allen*, 2 Stra. 706; *Peto v. Reynolds*, 9 Ex. 410;

B.B.E.

Reynolds v. Peto, 11 Ex. 418.

(c) Code, s. 3 (3). To be a bill it must not order payment to be made out of a particular fund; but it may indicate the particular fund out of which the drawee is to reimburse himself, or the particular account to be debited, or the transaction out of which the bill arose: Code, s. 3 (2) and (3); *Griffin v. Weatherby*, L. R., 3 Q. B. 753.

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But ~~not~~ an obligation to
pay a sum "together with
any int. that may accrue
thereon" is not a prom. note.
Lamberton v. Aiken 2 F. 189.

be payable with interest, by stated instalments with or without a proviso making the whole due on default of any instalment, or according to an indicated rate of exchange or a rate to be ascertained as directed by the bill (*d*). \angle

The person signing is called the drawer, the person to whom it is addressed is called the drawee, and the person to receive the money the payee.

When the drawee has undertaken to pay the bill, he is called the acceptor.

The bill may also be drawn payable to the drawer or to his order, or to the drawee or his order (*e*).

If the bill is made payable to C. or bearer, C. may transfer the bill to D. by merely delivering it into his hands, and D. then stands in the same situation with regard to the acceptor as C. the original payee did (*f*).

If the bill be payable to C., to C.'s order, or to C. or order, C. cannot then transfer except by a written order, usually on the back of the bill, called an indorsement and delivering it, after which C. is called the indorser, and D., if named in the indorsement, the indorsee; if no one be named in the indorsement the bill then becomes payable to bearer.

Every contract on a bill or note is incomplete and revocable until delivery (*g*).

Holder is a general word, and means payee or indorsee of a bill in possession of it, or bearer of a bill payable to bearer (*h*).

Holder in due course is one who has taken a bill complete and regular on its face, before it was due and without notice of any previous dishonour, in good faith and for value, and without notice at the time of any defect in his transferor's title. Every holder is *prima facie* a holder in due course (*i*).

No one but the holder can maintain an action in his own name on a bill of exchange or promissory note (*k*).

(*d*) Code, s. 9 (1).

(*e*) Where in a bill drawer and drawee are the same person, or the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat it at his option, either as a bill or a note. Code, s. 5.

(*f*) For brevity's sake, it is convenient to call the drawer A., the acceptor B., the payee C., and the first indorsee D.

(*g*) Delivery means transfer of possession, actual or constructive.

Code, ss. 2, 21, 84, and 89.

(*h*) Code, s. 2.

(*i*) Code, ss. 29 (1) and 30 (2). Holder in due course shortens considerably the former lengthy definition, "*bonâ fide* holder for value before due without notice."

(*k*) Code, s. 38 (1). A man who has no interest in the bill nor possession of it, but only lends his name for the purpose of suing on it, is not the holder. *Emmett v. Tottenham*, 8 Ex. 884; *Gill v. Lord Chesterfield*, *ibid.*; *Sainsbury*

By the common law of England no contract or debt is assignable, our ancestors appearing in the time of simplicity to have apprehended from such transfers much oppression and litigation. But mercantile experience has proved the assignment of debts to be indispensable, and bills of exchange to be the most convenient instruments for facilitating, securing, and authenticating the transfer. They have, therefore, come into universal use among all civilized nations, and the common law has recognized them as part of the *Law Merchant*. And though the rigidity of the common law has now been relaxed (36 & 37 Vict. c. 66, s. 25) to the extent of making debts and other legal choses in action assignable by writing (written notice being given to the debtor), yet bills and notes retain their superior convenience in being assignable by simple delivery, or indorsement and delivery, according to the requirements above explained.

The common law, again, distinguishes contracts into two kinds; contracts under seal or by deed, and contracts not under seal or simple contracts. Contracts under seal are valid without consideration; simple contracts are not enforceable unless consideration be averred and proved.

All the contracts arising on a bill of exchange are simple contracts, but they differed in the eyes of the common law from other simple contracts in these two particulars: first, that the benefit of the contract has long been assignable at law, and its obligation communicable (*l*); secondly,

v. Parkinson, *ibid.* Without indorsement pledgee of a note to order cannot sue. *Good v. Walker*, 61 L. J., Q. B. 736. But if before action it be indorsed and delivered to an agent without his principal's knowledge, and the principal after action brought ratifies the delivery, that ratification will relate back, and make the agent holder from the time of delivery. *Ancona v. Marks*, 31 L. J., Ex. 163; 7 H. & N. 686.

If a man find or steal a bill, though his mere possession will give him the right to retain the instrument as against strangers, yet he cannot sue on the bill, for under a traverse of the indorsement or delivery to him, which he must allege in his statement of claim, the real facts may be shown. *Marston v. Allen*, 8 M. & W. 494.

(*l*) Code, ss. 8 and 31. It was never necessary to plead usages which are part of the law merchant, such as the assignable qualities of bills of exchange, or bills of lading, or the general lien of bankers on the securities of their customers. "When," says Lord Campbell, "a general usage has been judicially ascertained and recognized, it becomes part of the law merchant, which Courts of justice are bound to know and recognize." *Brandao v. Barnett*, 3 C. B. 530; 6 M. & G. 665. The indorsement of a bill of lading formerly only assigned the property, but did not transfer the contract. *Thompson v. Dominy*, 14 M. & W. 403. But now by 18 & 19 Vict. c. 111, the rights of action pass to the indorsee, and a good title. *Cahn's case*, C. A. 1899, March 8th.

CHAPTER I.

Two peculiar qualities of contracts on bills or notes.

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I.

that consideration will be presumed till the contrary appear (*m*).

Effect of
drawing or
indorsing.

The legal effect of drawing a bill, payable to a third person, is a conditional contract by the drawer to pay the payee, his order, or the bearer, as the case may be, if the acceptor do not. The effect of accepting a bill, or making a note, is an absolute contract, on the part of the acceptor of the one, or maker of the other, to pay the payee, his order, or the bearer as the instrument may require. The effect of indorsing is a conditional contract, on the part of the indorser, to pay the immediate or any succeeding indorsee, or bearer, in case of the acceptor's or maker's default.

How far bills
and notes are
considered as
chattels.

Bonds, bills, notes, and other securities are not the subjects of larceny at *common law*. For the words *bona et catalla* used in indictments "do not of their proper nature," says Lord Coke, "extend to charters and evidences concerning freehold, or inheritance, or obligations, or other deeds or specialties, being things in action" (*n*). And these observations, as to obligations and deeds, are at common law applicable also to bills of exchange and promissory notes. In an indictment, bills or notes ought not in strict propriety to be described as chattels (*o*). But for almost all purposes, they are comprehended under the general words "*goods and chattels*," or either of them; and as such are forfeitable to the crown, and may be the subject of reputed ownership or fraudulent transfer (*p*).

May be taken
in execution.

At common law, neither money nor securities for money could be taken in execution, at the suit of a subject. But the 1 & 2 Vict. c. 110, s. 12, rendered money, bank notes, cheques, bills, promissory notes and other securities for money liable to be taken in execution. The money and bank notes are to be handed over by the sheriff to the execution creditor, and the sheriff, on receiving a sufficient indemnity, is to sue in his own name.

(*m*) Code, s. 30.

(*n*) *Calye's case*, 8 Co. Rep. 33 ; 4 Bla. Com. 234 ; 2 East, P. C. 597. But now by 24 & 25 Vict. c. 96, ss. 1, 27, they are for the purposes of that Act relating to larceny comprehended within the words "*valuable securities*" and the word "*property*."

(*o*) 4 Bla. Com. 234 ; 2 East, P. C. 16, s. 37, *Sadi and Morris's*

case.

(*p*) *Slade's case*, 4 Co. Rep. 93 ; *Bullock v. Dodds*, 2 B. & A. 258 ; 20 R. R. 420 ; *Ryall v. Rolle*, 1 Atk. 165 ; 1 Ves. sen. 363 ; *Hornblower v. Proud*, 2 B. & A. 327 ; 20 R. R. 456 ; *Cumming v. Bailey*, 6 Bing. 363 ; 4 Moo. & P. 36 ; 31 R. R. 438 ; *Edwards v. Cooper*, 11 Q. B. 33. See, too, post, Chapter on BANKRUPTCY.

Bills and notes may be taken under an extent.

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A bill, cheque, or note, or an indorsement thereon made before the Act 1 Vict. c. 26, might have had a testamentary effect. A testator gave three cheques, at different times, to a lady, and on the corresponding parts of the cheque book were found entries by him to the effect that they were given as a provision for her in case of his death. The cheques were held to be testamentary instruments, giving cumulative legacies (*q*). Parol evidence is inadmissible to show that an instrument was only to be payable in case of the testator's death (*r*). An indorsement on a note as "I give this note to C. D.," might have been testamentary (*s*).

Where a bill or note might operate as a testamentary instrument.

A bill or promissory note may, in some cases, be a declaration of trust (*t*).

As a declaration of trust.

(*q*) *Bartholomew v. Henley*, 3 Phill. 317.

(*r*) *Woodbridge v. Spooner*, 3 B. & A. 233 ; 1 Chit. R. 661 ; 22 R. R. 365.

(*s*) *Chaworth v. Beech*, 4 Ves. 565. For the circumstances under

which bills and notes will pass under a will, or as a "*donatio mortis causâ*," see the Chapter on NEGOTIATION.

(*t*) *Murray v. Glaspe*, 23 L. J., Chan. 126.

CHAPTER II.

OF A PROMISSORY NOTE.

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CHAPTER II.

What it is.

A PROMISSORY note, or, as it is frequently called, a note of hand, is an unconditional promise in writing, made by one person to another, signed by the maker, to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer (*a*). A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer (*b*). The

(*a*) Code, s. 83 (1) ; *Storm v. Stirling*, 3 E. & B. 842 ; *Cowie v. Stirling*, 6 E. & B. 333 ; 2 Bla. Com. 467.

(*b*) Sect. 84 ; *Chapman v. Cottrell*, 34 L. J., Ex. 186. It may, perhaps, be worthy of notice that while sect. 21 treats of contracts on a bill as being incomplete till delivery, and by sect. 89 (1) is made to apply to notes ; sect. 84 speaks of the note itself as being inchoate and incomplete until the first delivery or issue. This may create a difference between the first and any subsequent delivery

of a promissory note ; though more probably it is only an accidental variance of expression, as there is no case, it is believed, which draws any distinction between the maker of a note and the acceptor of a bill so far as regards the necessity and effect of delivery ; while the reasoning in *Cox v. Troy* (5 B. & A. 474 ; 24 R. R. 460) was expressly applied to a note in *Chapman v. Cottrell*. But the cases are not quite parallel, for the original delivery or issue of a bill is by the drawer, who till acceptance is the principal debtor.

sum of money is certain though payable with interest, or by stated instalments, with or without a proviso making the whole due on default of any instalment, or according to an indicated rate of exchange, or one to be ascertained as directed by the note itself (*c*).

At common law no note of hand was transferable ; and before the stat. 3 & 4 Anne, c. 9 (now repealed (*d*)), it was the opinion of Lord Holt and nearly all the judges, that no action could be maintained, even by the payee, on a promissory note, as an instrument, but that it was only evidence of a debt (*e*). That statute first made promissory notes assignable and indorsable like bills of exchange, and enabled the holder to bring his action on the note itself. Foreign notes were held to be within this statute. "They are," observes the Court of King's Bench, "within the words and spirit of the Act ; the words are 'all notes.' The Act was made for the advancement of trade, and ought therefore to receive a liberal construction. It is for the advantage of commerce that foreign, as well as inland bills, should be negotiable" (*f*). It was once doubtful whether this Act made English notes assignable abroad, but it is now decided that it did so (*g*).

Formerly not negotiable.

A note cannot be made by a man to himself, but if such an instrument be made to his order, and indorsed, it then becomes a note, and is payable to bearer, or indorsee or order, according as the indorsement is blank or special (*h*).

Note by a man to himself.

(*c*) Code, ss. 9 and 89.

(*d*) Code, Sched. II.

(*e*) *Buller v. Cripps*, 6 Mod. 29 ; *Clerke v. Martin*, 2 Ld. Raymond, 757 ; *Story v. Atkins*, ib. 1427 ; 2 Stra. 719 ; *Brown v. Harraden*, 4 T. R. 148 ; *Frier v. Bridgman*, 2 East, 359.

(*f*) *Milne v. Graham*, 1 B. & C. 192 ; 2 D. & R. 294 ; *Houriet v. Morris*, 3 Camp. 303 ; *Bentley v. Northouse*, 1 M. & M. 66. At one time it was thought that the Act did not extend to notes made abroad. *Carr v. Shaw*, Bayley, 23.

(*g*) *De la Chaumette v. Bank of England*, 9 B. & C. 208 ; 32 R. R. 643.

(*h*) Code, s. 83 (2). *Brown v. De Winton*, 17 L. J., C. P. 281 ; 6 C. B. 336 ; *Hooper v. Williams*, 2 Ex. 13 ; *Gay v. Lander*, 17 L. J., C. P. 286 ; 6 C. B. 336 ;

Wood v. Mytton, 10 Q. B. 805 ; *Flight v. McLean*, 16 M. & W. 51. So, in America, it has been held that an instrument payable to the maker and indorsed by him, is a promissory note. *Mal dow v. Caldwell*. 7 Miss. 563. And see 55 Geo. 3, c. 184, Sched. Pt. 1. In *Absolon v. Marks*, 11 Q. B. 19, the defendant was held liable on a note made by himself and others, promising to pay "to our and each of our order," but indorsed by him alone. So a bill to drawer's order is not a negotiable instrument till he indorse. *Singer v. Elliot*, 4 T. L. R. 594 ; *Jenkins v. Comber*, 1898, 2 Q. B. 168 ; 67 L. J. 780.

A note by a man to himself seems not to be within the definition in Code, s. 83 (1), unless s. 8 (4) removes the difficulty.

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Nor can there be a note by the maker to himself and another man (*i*). Nor a joint note by the maker and others to himself; but such a note, if joint and several, may be valid at the suit of the payee, as to the several contracts of his co-makers (*k*).

Joint and
several.

A note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenour (*l*). A note signed by more than one person and beginning "we promise, &c.," is a joint note only. Joint and several notes usually express that the makers jointly and severally promise; but a note signed by more than one person, and running, "I promise to pay," is several as well as joint (*m*). So a note beginning in the singular, "I promise," and signed by one partner for himself and his co-partners, is the joint note of all, and has been held to be also the several note of the signing party (*n*).

A joint and several note, though on one piece of paper, comprises, in reality and in legal effect, several notes (*o*). Thus, if A., B., and C. join in making a joint and several promissory note, there are, in effect, four notes. There is the joint note, of the three makers, and there are also the several notes of each of the three (*p*). The joint note may

(*i*) *Moffat v. Van Millingen*, 2 B. & P. 124, n.; 5 R. R. 557; *Mainwaring v. Newman*, *ibid.* 120; 5 R. R. 554; *Teague v. Hubbard*, 8 B. & C. 345; but indorsement apparently will remove the difficulty. *Quære*, as to the effect of survivorship.

(*k*) *Beecham v. Smith*, 27 L. J., Q. B. 257; E. B. & E. 442.

(*l*) Sect. 85 (1).

(*m*) Code, s. 85 (2). *March v. Ward*, Peake, 130; 3 R. R. 667; *Clerk v. Blackstock*, Holt, N. P. C. 474; 17 R. R. 667. So held, too, in America. *Hemmenway v. Stone*, 7 Mass. 58; *Barnett v. Skinner*, 2 Bay. 88; *Monson v. Drakley*, 16 Amer. R. 74. So a bond in the singular number, executed by several, is several as well as joint. *Sayer v. Chaytor*, 1 Lutw. 695; *Galway v. Matthew*, 1 Camp. 403; 10 East, 264; 10 R. R. 289. As to a joint, or joint and several, warrant of attorney, see *Dalrymple v. Fraser*, 15 L. J., C. P. 193; 2 C. B. 698.

(*n*) *Doty v. Smith*, 11 Johns.

Amer. Rep. 543; *Hall v. Smith*, 1 B. & C. 407; 2 D. & R. 584; *Galway v. Matthew*, 1 Camp. 403; 10 R. R. 289. But *Hall v. Smith* seems to be overruled in *Ex parte Buckley*, 14 M. & W. 475; 15 L. J., Bkcy. 3. See also *MacLae v. Sutherland*, 3 E. & B. 1.

(*o*) *Fletcher v. Dyche*, 2 T. R. 36; 1 R. R. 414, Ashurst, J.; *Owen v. Wilkinson*, 28 L. J., C. P. 3; 5 C. B., N. S. 526.

(*p*) See the observations of Parke, B., in *King v. Hoare*, 13 M. & W. 505, followed in *Brinsmead v. Harrison*, L. R., 6 C. P. 584; *Bulbeck v. Jones*, 5 Jur., N. S. 1317; *Beecham v. Smith*, E. B. & E. 442. In such a case the payee might sue the three, or each singly; he could not do both. *Streatfield v. Halliday*, 2 T. R. 782. But see now Ord. XVI. r. 6, enabling the plaintiff to join any or all persons severally, or jointly and severally, liable on any one contract including parties to bills and notes; and *Davies v. Jenkins*, L. R., 1 Chan. D. 696.

be valid although the several notes are void (*q*). Yet, for some purposes, it is still one contract. Thus, an alteration which affects the liability of one maker vitiates the entire instrument (*r*).

In case of a note on its face joint, or joint and several, it is conceived that evidence to show that one maker is surety for the other (*s*) was inadmissible at law, if the question arose between the creditor and the surety; but evidence to that effect has been received (*t*). Where, however, the question arises between the principal debtor and the sureties in an action for indemnity or contribution, such evidence is admissible.

Where there
is principal
and surety.

Joint debtors equally liable, as between themselves (not being general partners (*u*)), are severally entitled at law to contribution (*x*), even against the executor of a contributory (*y*). Therefore, one of several joint, or joint and several makers of a note, who pays more than his share, may maintain an action against another for contribution; and he may also on giving a proper indemnity, sue his companion on the instrument in the creditor's name, and

Contribution
between joint
makers.

(*q*) *MacLae v. Sutherland*, 3 E. & B. 1; or the joint note be discharged in bankruptcy leaving the separate notes intact. See *Simpson v. Henning*, L. R. 10 Q. B. 406.

(*r*) *Gardner v. Walsh*, 5 E. & B. 91.

(*s*) *Price v. Edmunds*, 10 B. & C. 578; *Strong v. Foster*, 17 C. B. 201; but see *Manley v. Boycott*, 2 E. & B. 46.

(*t*) *Garrett v. Jull*, S. N. P. 377; and see the observations of Williams, J., in *Reynolds v. Wheeler*, 30 L. J., C. P. 351; 10 C. B., N. S. 561; *Hall v. Wilcox*, 1 M. & Rob. 58. The admission of such evidence seems to contravene the general rule of law, that parol evidence is inadmissible to vary or explain a written contract. Where the indorsee sues, another objection interposes, that the indorsee would be affected by a contract of which he had no notice. Besides, from the case of *Fentum v. Pococke*, 5 Taunt. 192; 1 Marsh. 14,

which has been recognized as law ever since it was decided, this general principle seems to result, that parties to a negotiable security shall be held to the consequences of the characters which they severally assume on the face of the instrument. Indeed, in *Strong v. Foster*, 17 C. B. 201, the Court of C. P., relying on some expressions of Lord Cottenham in *Holtier v. Eyre*, 9 Cl. & F. 45, seemed to think the rule the same in equity as at law. But the case of *Strong v. Foster* may be considered as overruled; see post, Chapter on PRINCIPAL AND SURETY, and *Perfect v. Musgrave*, 6 Price, 111.

(*u*) *Sadler v. Nixon*, 5 B. & Ad. 936.

(*w*) *Burnell v. Minot*, 4 Moore, 340; *Hutton v. Eyre*, 6 Taunt. 289; 16 R. R. 619; *Holmes v. Williamson*, 6 M. & S. 158; *Edgar v. Knapp*, 6 Scott's N. R. 707; 5 M. & G. 753.

(*y*) *Prior v. Henbrow*, 8 M. & W. 882.

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his own payment shall not be pleadable in bar (z). He may now cause him to be introduced as a co-defendant into the action (a).

Bank notes.

A bank note is a promissory note, made by a banker, payable to bearer on demand, and intended to circulate as money (b).

Bank of
England
notes.

The term bank note is sometimes used indiscriminately for the note of a country bank, or the note of the Governor and Company of the Bank of England; but, in law books, a bank note is commonly taken to mean a Bank of England note. "Bank notes," says Lord Mansfield, "are not goods, not securities nor documents for debts, nor are they so esteemed; but are treated as money, as cash, in the ordinary course and transactions of business, by the general consent of mankind, which gives them the credit and currency of money, to *all* intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash. They pass by a will which bequeaths all the testator's money or cash, and are never considered as securities for money, but as money itself. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes. So, on bankruptcies they cannot be followed as identical, and distinguishable from money, but are always considered as money or cash" (c). Like money, they could not, at common law, be taken in execution (d), but may be taken by virtue of the stat. 1 & 2 Vict. c. 110, s. 12.

When a legal
tender.

Gold coin was formerly the only legal tender above a certain amount (e); bank notes were, nevertheless, a good tender, unless objected to on that account (f); but it is enacted, by 3 & 4 Will. 4, c. 98, s. 6, that Bank of England

(z) 19 & 20 Vict. c. 97, s. 5; *Batchelor v. Lawrence*, 30 L. J., C. P. 39; 9 C. B., N. S. 543.

(a) Order XVI. rr. 48 et seq. See, too, Chapter XX. as to CONTRIBUTION.

(b) As to the power of the Bank of England and other banks to issue promissory notes, see the Chapter on the CAPACITY OF PARTIES TO A BILL OR NOTE.

(c) *Miller v. Race*, 1 Burr. 452; *Fleming v. Brooke*, 1 Sch. & Lefr.

318; 11 Ves. 662; 9 R. R. 35; *Drury v. Smith*, 1 P. Wms. 404; *Miller v. Miller*, 3 P. Wms. 356; Ambler, 68.

(d) *Francis v. Nash*, Rep. temp. Hardwicke, 53; *Knight v. Criddle*, 9 East, 48; *Armistead v. Philpot*, 1 Dougl. 219; *Fieldhouse v. Croft*, 4 East, 510.

(e) 56 Geo. 3, c. 68, s. 11.

(f) *Wright v. Reed*, 3 T. R. 554; *Grigby v. Oakes*, 2 B. & P. 526; *Brown v. Saul*, 4 Esp. 267.

notes shall be a legal tender for all sums above 5*l.*, except at the Bank of England or its branches.

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The Act regulating legal tenders is the 33 & 34 Vict. c. 10 ; there is no limit as to gold, but silver must not exceed 40*s.*, nor bronze coins 1*s.*, to constitute a valid tender.

Formerly, money was kept with goldsmiths, who, about the year 1670, introduced, as receipts for deposits, promissory notes payable to bearer, called Goldsmiths' Notes ; the assignable quality of these notes was strenuously denied by Lord Chief Justice Holt, in the reign of Queen Anne. At length, the stat. 3 & 4 Anne, c. 9, made them assignable, like bills. Cheques on bankers have now superseded goldsmiths' notes, in London ; but bankers' cash notes, or, as they were formerly called, *shop notes*, and country bank notes, are now what goldsmiths' notes were formerly.

Country bank notes.

Country bank notes are also a legal tender, unless objected to, and are considered as cash (*g*).

When a legal tender.

Assumpsit for money had and received would lie for country bank notes and cheques which had been treated as money (*h*), but not otherwise (*i*) ; for it has been held, that an action for money had and received would not lie against the finder of lost notes unless they have been turned into money, or treated by the defendant as money.

When money had and received would lie for them.

No precise words of contract are essential in a promissory note, provided they amount in legal effect to an unconditional promise to pay. Thus, "I promise to account with A. B. or order for 50*l.*, value received by me," has been held a good note within the statute (*k*). So, "I do acknowledge myself to be indebted to A. in 100*l.*, to be paid on demand for value received," was, after solemn argument, held to be a good note within the statute, the words "*to be paid*" amounting to a promise to pay ; the Court observing, that the same words in a lease would

Of the contracting words in a promissory note.

(*g*) Chitty, 521 ; *Owenson v. Morse*, 7 T. R. 64 ; *Ward v. Erans*, 2 Ld. Raym. 928 ; *Tiley v. Coursier*, K. B. 1817 ; overruling *Mills v. Stafford*, Peake, N. P. 240, n. ; *Lookyer v. Jones*, Peake, N. P. 240, n. ; 3 R. R. 682, n. ; *Polglass v. Oliver*, 2 C. & J. 15 ; 2 Tyr. 89 ; 37 R. R. 623.

(*h*) *Pickard v. Bankes*, 13 East, 20 ; *Spratt v. Hobhouse*, 4 Bing. 173 ; 12 Moo. 395.

(*i*) *Noyes v. Price*, Chitty, 354.

(*k*) *Morris v. Lee*, 2 Ld. Raym. 1396 ; 1 Stra. 629 ; 8 Mod. 362 ; *Chadwick v. Allen*, 2 Stra. 706 ; *Peto v. Reynolds*, 11 Ex. 418.

CHAPTER
II.

amount to a covenant to pay rent (*l*). And where, for an executed consideration, a note was given, expressed to be "for 20*l*. borrowed and received," but at the end were the words, "which I promise *never* to pay," Lord Macclesfield rejected the word *never* (*m*). For a contract ought to be expounded in that sense in which the party making it apprehended that the other party understood it.

If there be no words amounting to a promise, the instrument is merely evidence of a debt, and may be received as such between the original parties (*n*). Such is the common memorandum I O U (*o*).

(*l*) *Casborne v. Dutton*, S. N. P. 426; *Brooks v. Elkins*, 2 M. & W. 74. But in *Horne v. Redfearn*, (4 Bing. N. C. 433; 6 Scott, 260), the following instrument was held not to be a promissory note:—"I have received the 20*l*. which I borrowed of you, and I have to be accountable for the same sum with interest."

In *Jarvis v. Wilkins*, 7 M. & W. 410, the following instrument was held to be a guarantie, and not a note:—"Sept. 11, 1839. I undertake to pay to Mr. Robert Jarvis the sum of 6*l*. 4*s*. for a suit of clothes ordered by Daniel Page." The Court observed that the expression "ordered" showed that the consideration was executory.

"I, R. J. M., owe Mrs. E. the sum of 6*l*., which is to be paid by instalments for rent. Signed, R. J. M." Held, not to be a promissory note, as no time was stipulated for the payment of the instalments. *Moffatt v. Edwards*, 1 Car. & M. 16.

"Memo. Mr. Sibree has this day deposited with me 500*l*. on the sale of 10,300*l*. 3*l*. per cent. Spanish, to be returned on demand." Held not to be a promissory note. *Sibree v. Tripp*, 15 M. & W. 23.

"Borrowed of Mr. J. White the sum of 200*l*. to account for on behalf of the Alliance Club at two months' notice if required," was held not to be a note. *White v. North*, 3 Exch. Rep. 689.

"Received 150*l*. of Messrs. B. to account for on demand," held

not to be a "security for money." *Hopkins v. Abbott*, L. R. 19 Eq. 222.

"Borrowed, this day, of Mr. John Hyne, Stonehouse, the sum of 100*l*. for one or two months; cheque 100*l*. on the Naval Bank," was held to be a simple acknowledgment, and not a note or agreement. *Hyne v. Dewdney*, 21 L. J., Q. B. 278.

The following instrument was held to be a promissory note:—"John Mason, 14th Feb. 1836, borrowed of Mary Ann Mason, his sister, the sum of 14*l*. in cash, a loan, in promise of payment of which I am truly thankful for." *Ellis v. Mason*, 7 Dowl. P. C. 598.

A letter in this form is a promissory note:—"Gentlemen, I have received the imperfect books which, together with the costs overpaid on the settlement of your account, amounts to 80*l*. 7*s*., which sum I will pay you within two years from this date. I am, Gentlemen, your obedient servant, "Thos. Williams." *Wheatley v. Williams*, 1 M. & W. 533.

A promise to pay or cause to be paid is a good note. *Dixon v. Nuttal*, 6 C. & P. 320; 1 C., M. & R. 307.

(*m*) 2 Atkyns, 32; *Allen v. Mauson*, 4 Camp. 115; Bayley, 5 Ed. 5.

(*n*) *Waynam v. Bend*, 1 Camp. 175.

(*o*) *Israel v. Israel*, 1 Camp. 499; 10 R. R., 737; *Fisher v. Leslie*, 1 Esp. 426; *Childers v. Boulnois*, D. & R. N. P. 8. But

A note, as we have seen, may be payable by instalments (*p*), and such a note was held to be within the statute 3 & 4 Anne, c. 9 (now repealed). Days of grace are allowed on each instalment (*q*).

It is conceived that presentment and notice of dishonour are required when each instalment falls due, in order to charge indorsers, but that laches as to one instalment in ordinary cases only discharges indorsers as to that one. And that a note payable by instalments cannot be indorsed for less than the entire sum due upon it (*r*).

A note payable by instalments may contain a proviso that on failure of payment of any instalment, the whole debt is to become due (*s*).

A promissory note is not the less a note because it contains a recital that the maker has deposited title deeds with the payee as a collateral security, or a pledge of collateral security with power to sell (*t*), or because it refers to an agreement, where it does not appear that the agreement qualifies the note (*u*). But an agreement in the instrument to give further security in future would invalidate it as a promissory note (*x*).

A note which is, or on the face of it purports to be, both made and payable within the British Islands, is an inland note ; any other is a foreign note (*y*).

The maker of a note, like the acceptor of a bill of exchange, promises absolutely to pay according to its

CHAPTER II.

Of notes payable by instalments.

Other matters contained in a note.

Inland and foreign.

Contract of the maker.

see *Guy v. Harris*, Chit. 526, where Lord Eldon held such an instrument to be a promissory note. But it clearly is not such at this day. See *Tomkins v. Ashby*, 6 B. & C. 541 ; 9 D. & R. 343 ; 1 M. & M. 32. See further on this subject, Chapter IV. on an I O U.

(*p*) Code, ss. 9 and 89. *Orridge v. Sherborn*, 11 M. & W. 374 ; 12 L. J., Ex. 313.

(*q*) Ibid., supra ; Code, ss. 14 and 89.

(*r*) Code, s. 32 (2), is apparently to the same effect.

(*s*) Code, ss. 9 (c) and 89. *Carlton v. Kenealey*, 12 M. & W. 139.

(*t*) *Wise v. Charlton*, 4 A. & E. 786 ; 6 N. & M. 364 ; 2 H. & W.

49 ; *Fancourt v. Thorn*, 9 Q. B. 312 ; *Storm v. Stirling*, 3 E. & B. 841 ; Code, s. 83 (3). If the pledge be of stocks, shares, or marketable securities, the note stamp suffices : 54 & 55 Vict. c. 39, s. 23 (1) ; but if the note accompany an equitable mortgage (s. 86 (2)) a stamp on that is required as well. Sched. Mortgage (3).

(*u*) *Jury v. Baker*, 28 L. J. Q. B. 255 ; E. B. & E. 459.

(*x*) Code, ss. 3 (2) and 89. ~~not so~~ too a condition as to the effect of giving time to or taking security from one party. ~~*Kirkwood v. Smith*, 1896, 1 Q. B. 582, 65 L. J. 408, *Kirkwood v. Canoll* [1903] 1 K. B. 531, C. A.~~

(*y*) Code, s. 83 (4). Where a foreign note is dishonoured here,

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tenour (z) ; and when the note is in the hands of a holder in due course, is estopped from denying the existence of the payee and his then capacity to indorse.

Time of presentment.

Though not necessary in general to charge the maker, due presentment for payment to the maker is necessary, in order to charge the indorser ; and it must be made within a reasonable time after the indorsement, if the note be payable on demand (a).

When overdue.

The rule as to overdue instruments is not so strict in the case of a note payable on demand, as in the case of bills of exchange and cheques ; when a note payable on demand is negotiated, it is not considered overdue, so as to affect an innocent holder with defects of title, because it has not been presented within a reasonable time after its issue (b).

Promissory notes often accompany other securities, such as mortgages, bills of sale, &c., as affording a more speedy remedy in case of default : they may be valid and binding though the instruments, which they accompany, be not so (c). If indorsed away, even though in breach of faith, there will be no defence against a holder in due course (d).

Summary of chief points of difference between a bill and a note.

The following seem therefore to be the chief points in which promissory notes differ from bills of exchange :— There are only two parties to a note—maker and payee, whereas there are three to a bill—drawer and acceptor and payee ; hence, as the contract of the maker is the primary or absolute contract, like that of the acceptor, the rules

so far as the law of this country is concerned, protest is not required. S. 89 (4).

(z) Code, s. 88. If the note be in the body of it made payable at a particular place, neither maker nor indorser are liable, unless it be presented at that place, but not so if it be mentioned as a memorandum merely, s. 87. In the case of a bill the acceptance must say at a "particular place only, and not elsewhere," or it will be a general acceptance, s. 19 (2) c ; and even then the acceptor will not be discharged by omission to present there on the proper day unless he expressly so stipulate on the bill. Code, s. 52 (2).

(a) Code, ss. 86 and 87 (2) and (3). Reasonable time will perhaps receive a more liberal interpreta-

tion in the case of a note than of other negotiable instruments, as a note is often intended as a guarantee or continuing security. See post, Chapter on PRESENTMENT FOR PAYMENT.

(b) Sect. 86 (3) contains an exemption in favour of notes payable on demand from the provisions in s. 36 (3) as to other negotiable instruments on demand. See post, Chapter on PRESENTMENT FOR PAYMENT.

(c) *Monetary Advance Co. v. Cater*, 20 Q. B. D. 785 ; 57 L. J. 463.

(d) *Glasscock v. Balls*, 24 Q. B. D. 13. As to the position of the parties in case of bankruptcy, see *Baines v. Wright*, 16 Q. B. D. 330.

regulating presentment for acceptance, acceptance, and acceptance and payment *supra* protest do not apply to notes (e). Notes are not made in sets, nor is protest required in the case of a foreign note dishonoured here (f).

They bear an *ad valorem* stamp in every case, and there are certain restrictions against bankers and others issuing notes payable to bearer on demand.

Notes may be not only joint, but joint and several, and may, in addition, contain certain other matters, such as a pledge, with power to sell as a collateral security.

And the strictness of the rule as to defects attaching to the title of the transferee of an overdue instrument is relaxed in the case of a promissory note payable on demand.

(e) Sect. 89 (3). The maker is in the code deemed to stand in the acceptor's shoes, and first indorser of a note in the same position as drawer of an accepted bill payable to drawer's order (and

indorsed by him ?).

Sect. 65 (1) impliedly excludes them by using the full title, bill of exchange, instead of merely bill as elsewhere.

(f) S. 89 (3) and (4).

CHAPTER III.

OF A CHEQUE ON A BANKER.

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III.

What instru-
ments are
cheques.

A CHEQUE is a bill of exchange drawn on a banker, payable on demand ; and is consequently subject in general to the rules which regulate the rights and liabilities of parties to bills of exchange (a).

(a) Code, s. 73. *Keene v. Beard*, 8 C. B., N. S. 372 ; *Rickford v. Ridge*, 2 Camp. 537. Cheques are generally though not necessarily inland bills, and even

though drawn out of the United Kingdom, unless that appear on their face, are or certainly may be treated as inland, Code, s. 4 (2). Should that appear on their face

Cheques on bankers have been for many years and are now, more than ever, the most powerful instruments for economizing the currency, both metallic and paper. They were once exempted from all stamp duty, and are now subject to a duty of one penny only (*b*).

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Formerly exempted from stamp.

they are still valid, Code, s. 72 (1) *b*, but are foreign bills (? if so for the Stamp Act, see *Ex parte Boyse*, 33 Ch. D. 612), and may require protesting in case of dishonour, Code, s. 51 (2), to preserve the remedy against the indorsers and possibly the drawer.

In this country, where bills on demand other than cheques are rare, practically every draft on demand on a bank is a cheque, and subject to the peculiar rules of law concerning them. But in theory at all events they must be drawn by a customer against his balance. In America, where the line of distinction between banks and merchants is perhaps not so sharply drawn as here, the Supreme Court has been at pains on more than one occasion to point out the difference between cheques and bills, see *Harrison v. Wright*, 50 Amer. Rep. 808; *Bull v. First National Bank of Kasson*, 123 Sup. Ct. ; 16 Davis, 105. The custom that has arisen in America of "certifying" cheques, which is almost equivalent to acceptance, is not known here.

(*b*) 54 & 55 Vict. c. 39, the present general Stamp Act. The general Stamp Act, 55 Geo. 3, c. 184, finally repealed in 1870, while it subjected bills in general to stamps, exempted from all duties all drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as such, who should reside or transact the business of a banker, within ten (afterwards by 9 Geo. 4, c. 49, s. 15, fifteen) miles of the place where such drafts or orders should have been issued, provided such place were specified in such drafts or orders,

B.B.E.

and provided the same bore date on or before the day on which they were issued, and provided they did not direct payment to be made by bills or notes. This defence was raised under the old form of pleading by a traverse of the drawing, *McDowall v. Lyster*, 2 M. & W. 52; *Field v. Woods*, 7 A. & E. 114; 2 N. & P. 117; 6 Dowl. 23; as to what dealings did not constitute an issuing, see *Ex parte Bignold*, 2 Mont. & Ayr. 663; 1 Deac. 712. The 16 & 17 Vict. c. 59, sched., which subjected drafts or orders, for the payment of any sum of money to the bearer on demand, to a duty of one penny, contained the same exemption. The 17 & 18 Vict. c. 83, s. 7, prohibited the negotiation or circulation of drafts so exempted beyond fifteen miles under a penalty of fifty pounds; though s. 8 authorized stamping such orders so as to permit such circulation. In order to bring cheques within the above exemption, they must have been drawn on a banker, *Castleman v. Ray*, 2 B. & P. 383; must have specified truly the place where drawn, *Walters v. Brogden*, 1 Y. & J. 457; *Bopart v. Hicks*, 3 Ex. 1; 8 Q. B. 674; *R. v. Pooley*, 3 B. & P. 311; *Strickland v. Mansfield*, 8 Q. B. 675; *Bond v. Warden*, 1 Coll. 583; *Ward v. Oxford Rail. Co.*, 2 De Gex, Mac. & G. 750; and that place must have been within fifteen miles from the bank; they must have been payable to bearer on demand, *R. v. Yates*, Moo. C. C. 170; Car. C. L. 3rd ed. 273; when the twelve judges held that a cheque payable to D. F. J. and not to bearer, not being stamped, was void, and so was not "a valuable security," the subject of larceny within 7 & 8 Geo. 4, c. 29, s. 5.

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III.Existing
stamp duty.

All banker's cheques are now, therefore, subject to a stamp duty of one penny wherever made, and wherever the banker may live or carry on business, they may also be ante-dated, post-dated, dated on Sunday (or other non-business day?), or not dated at all (*c*), and need not specify the place where they were drawn, or where payable (*d*).

By sect. 18 of the 23 & 24 Vict. c. 111 (now repealed), bankers or persons acting as such, into whose hands a banker's draft or order came unstamped, might affix thereto the necessary adhesive stamp, cancel it, and charge the drawer with the stamp, but the drawer was not thereby relieved from the penalty.

A similar provision is contained in the present Stamp Act, 54 & 55 Vict. c. 39, ss. 32—35.

Amount for
which a
cheque may
be drawn.

A cheque may now be drawn or negotiated for any sum of money large or small (*e*). The sum is usually expressed

But a man who steals a void cheque may be convicted of larceny of a piece of paper, *R. v. Perry*, 1 C. & K. 725; they could not be post-dated, *Allen v. Kerres*, 1 East, 435; 3 Esp. 281; *Whitwell v. Bennett*, 3 B. & P. 559; nor could they direct payment to be made by bills or notes. The penalties on bankers and other parties dealing with cheques unstamped under colour of this exemption, but not falling strictly within it, were extremely severe; the drawer and the banker forfeited 100*l.*, and the other parties 20*l.*, the banker, moreover, was not allowed to charge it in account.

Such was the general effect of the various statutes down to the year 1858; but since the 24th May in that year, all drafts or orders for the payment of money to the bearer on demand, which were exempt from duty, were by the 21 & 22 Vict. c. 20, s. 1, made chargeable with a duty of one penny, and a similar duty is imposed by the present general Act.

(*c*) Code, s. 3 (4) a; 13 (2).

(*d*) Code, s. 3 (4) c. The 55 Geo. 3, c. 184, s. 13, struck expressly at frauds and evasions of the duties under colour of the exemption in favour of cheques,

an exemption which cheques presently ceased to enjoy. Accordingly, even before the repeal of that Act, it was held that a cheque payable to order might be post-dated. *Emmanuel v. Roberts*, 9 B. & S. 121; *Whistler v. Foster*, 32 L. J., C. P. 161; 14 C. B., N. S. 248; *Bull v. O'Sullivan*, L. R., 6 Q. B. 209; 40 L. J. 141. So, too, of a cheque payable to bearer, *Austin v. Bunyard*, 34 L. J., Q. B. 217, though the holder in that case had no notice. *Gatty v. Fry*, 2 Ex. D. 265; followed in *Royal Bank of Scotland v. Tottenham*, 1894, 2 Q. B. 715; *Curry v. Misa*, L. R., 1 App. Ca. 555; *Forster v. Mackworth*, L. R., 2 Ex. 163; 36 L. J. 94, where a post-dated cheque was held equivalent to a bill of exchange for a like period, and therefore not binding on a partner not in trade.

(*e*) 54 & 55 Vict. c. 39, s. 32. Formerly a cheque for less than 20*s.* was absolutely void, and entailed a penalty on the parties issuing or negotiating it; 48 Geo. 3, c. 88, s. 3. So, too, one on which less than 20*s.* remained due. And while the 17 Geo. 3, c. 30 (long temporarily but now finally repealed) was in force, no cheque could be drawn for less than 5*l.* But by the 7 Geo. 4, c. 6, s. 9, which temporarily

both by words and figures; should there be a discrepancy between the two, the sum payable is that denoted by the words (*f*).

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Generally speaking, the drawee of a bill is not liable till acceptance, and as cheques are not accepted, the payee cannot enforce payment from the bank. But a banker, having in his hands effects of his customer, is bound within a reasonable time after he has received the money to pay his customer's cheques, and is liable to an action at the suit of the customer if he do not. For there is an implied contract between the banker and the customer, that the banker shall pay the customer's cheques, and the customer's credit may be seriously impaired by a refusal. M. kept his account with Williams & Co., bankers. One day in the morning the balance in their hands due to M. was 69*l.* 16*s.* 6*d.* About one o'clock on the same day, a 40*l.* Bank of England note was paid into M.'s account; a little after three o'clock a cheque drawn by M. for 87*l.* 7*s.* 6*d.* was presented. The clerk, after having referred to a book, said there were not sufficient assets, but that the cheque might probably go through the clearing house. On the following day the cheque was paid. M. brought a special action on the case against the bankers. No actual damage was proved, but the jury found a verdict for the plaintiff with nominal damages (*g*). On a rule for a new trial, Lord Tenterden said, "I cannot forbear to

Duty and
authority of
banker to pay.

revived that Act, an exception was made in favour of drafts by a man on his own banker for money held by that banker to the use of the drawer. And by sect. 19 of the 23 & 24 Vict. c. 111 (now repealed), it was rendered lawful for any person to draw on his banker who *bonâ fide* held money for him, for a sum less than 20*s.*

(*f*) Code, s. 9 (2).

(*g*) *Marzetti v. Williams*, 1 B. & Ad. 415; 1 Tyr. n.(b); 35 R. R. 329; *Rolin v. Steward*, 14 C. B. 595. A verdict for 500*l.* was obtained in this case, but the amount was subsequently reduced at the recommendation of the Court. A banker having securities in his hands, though the cash balance was against the customer, has been held liable, when in a previous course of similar dealing

cheques had been paid. *Cumming v. Shand*, 29 L. J., Ex. 129. There are two cases in which a holder may indirectly recover from the bank, namely, when the bank fails, and the holder has committed laches in presentment, in which case he proves for the amount, and not the drawer. Code, s. 74 (1). And secondly, when a banker pays a crossed cheque without due regard to the crossing, in which case he is liable to the true owner for any loss occasioned thereby. Sect. 79. In Scotland, when the drawee of a bill has funds available for payment, the bill or cheque operates as an assignment in favour of the holder from the time it is presented to the drawee. Sect. 53.

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observe that it is a discredit to a person, and therefore injurious in fact, to have payment refused of a draft for so small a sum ; for it shows that the banker had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade. My judgment in this case, however, proceeds on the ground that the action is founded on a contract between the plaintiff and the bankers—that the bankers whenever they should have money in their hands belonging to the plaintiff, or within a reasonable time after they should have received such money, would pay his cheques ; and there having been a breach of such contract, the plaintiff is entitled to recover damages.”

Although no evidence is given that the plaintiff has sustained any special damage, the jury ought not to limit their verdict to nominal damages, but should give such temperate damages as they may judge to be a reasonable compensation for the injury the plaintiff must have sustained from the dishonour of his cheque.

But if the funds in the banker's hands have been applied to the payment of the customer's acceptance, made payable at the bankers, though without any further authority, that is a defence to an action for dishonouring a cheque (*h*).

How determined.

Death of drawer.

The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by a countermand of payment ; or by notice of his customer's death (*i*).

When a banker, knowing that a breach of trust was being contemplated by the drawer, refused to cash the cheque, he was held to be justified in so doing (*k*).

Time of presentment for payment.

Cheques, being in effect bills of exchange payable on demand, must be presented within a reasonable time after

(*h*) *Keymer v. Laurie*, 18 L. J., Q. B. 218.

(*i*) Code, s. 75. Countermand of payment excuses presentment in case of a cheque, and the Statute of Limitations begins to run at once against the holder from that date. *In re Bethell*, 34 Ch. D. 561 ; but in the case of a bill the holder must still present even though he know that the drawer has desired the drawee not to accept or pay. Code, ss. 41 (3), 46 (2) a. *Hill v. Heap*, D. & R., N. P. C. 57 ; 25 R. R. 791.

In the case of the drawer's

(*k*) a telegram is not a countermand
the banker is not a good countermand
whether a telegram can be a countermand (?). *Curtice v. London City & Midland Bank*. [1908] 1 K.B. 293

death a distinction was formerly held to exist between cheques to order and those to bearer. *Rolls v. Pearce*, 5 Ch. D. 730 ; but the present section seems to include both. If the banker pay before notice the payment is good, *Tate v. Hilbert*, 2 Ves. Jun. 118 ; 2 R. R. 175. See post, *donatio mortis causa*.

(*k*) *Gray v. Johnston*, L. R., 3 H. of L. 1. Where funds in a banker's hands had been attached, though for a less amount, the banker's refusal to allow his customer to draw for the balance was held to be right. *Rogers v.*

issue, in order to render the drawer liable, and within a reasonable time after the indorsement, in order to render the indorser liable; regard being had in determining what is a reasonable time to the nature of the instrument, the usage of trade and bankers, and the facts of the particular case (*l*). "The result of the cases," says Tindal, C. J., "from *Rickford v. Ridge* to *Boddington v. Schlenker*, is, that the party receiving a cheque has till the following day to present it, where there are the ordinary means of doing so" (*m*). By the express words of the Code, Sundays, Good Friday, Bank Holidays, and Public Fasts, are "non-business days," s. 92; and as by s. 45 (3), presentment must be made on a business day, those days are excluded, and following day may be taken to mean following business day. Formerly, it was held, that the cheque must be presented on the *morning* of the next day; it is now, however, firmly established, that the holder has the whole of the banking hours of the next day within which to present it (*n*). Government cheques are not payable at the Bank of England after three o'clock (*o*).

But there is one material difference between the liability of the *drawer* of a cheque and the drawer of a bill payable on demand.

Liability of
drawer on
delay of pre-
sentment.

The drawer of a cheque is not discharged by the holder's failure to present in due time, unless the drawer have sustained from the delay actual prejudice, as by the failure of the banker (*p*). The cheque, though no assignment (save in Scotland after presentment to drawee, Code, s. 53 (2)), is yet virtually an appropriation of a sum of money in the banker's hands to lie till called for; but by delay the

Whiteley, 1892, Ap. Ca. 118; 58 L. J., Q. B. 416; following *Chatterton v. Watney*, 17 Ch. D. 259.

(*l*) Code, ss. 45 and 74. In *Wheeler v. Young*, 13 T. L. R. 468, the point was left wholly to the jury.

(*m*) *Moule v. Brown*, 4 Bing. N. C. 268; 5 Scott, 694; presentment to the banker's London agent, though named in the printed form of the cheque, has been held insufficient, *Bailey v. Bodenham*, 16 C. B., N. S. 288; 33 L. J. 252; a presentment through the post office seems to be sufficient, *Prideaux v. Criddle*, L. R., 4 Q. B. 455; *Heywood v.*

Pickering, 9 Q. B. 428; Code, ss. 45 (8) and 41 (1) e.

(*n*) *Pocklington v. Sylvester*, Chitty, 9th ed. 385; *Robson v. Bennett*, 2 Taunt. 388; 11 R. R. 614; *Rickford v. Ridge*, 2 Camp. 537.

(*o*) 4 & 5 Will. 4, c. 15, s. 21.

(*p*) *Serle v. Norton*, 2 Mood. & Rob. 401; *Alexander v. Burchfield*, 3 Scott, N. R. 555; 7 M. & G. 1067; *Robinson v. Hawksford*, 9 Q. B. 52; *Laws v. Rand*, 27 L. J., C. P. 76; 3 C. B., N. S. 442; the loss in such a case is now equitably distributed, the holder proving against the bank in the drawer's stead, ss. 47 (1) and 74.

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holder takes the risk of the bank's failure (*q*), or revocation of their authority to pay by death of drawer (*r*), or countermand of payment.

As between the holder and his own banker.

If the payee of the cheque pay it into his bankers living in the same place that they may present it, the bankers may be, as between their customer and the drawer, still bound to present it on the day after it was originally issued. But as between their customer and themselves they may be bound to present it earlier, or justified in postponing the presentment later (*s*).

Where the parties do not live in the same place.

If the party receiving the cheque from the drawer do not live in the same place with the drawee, he should send it to his banker or other agent by the next day's post, and they should present it on the day after they have received it (*t*). The banker should send it direct to the drawee, and cannot postpone the time of presentment by circulating it through agents or branches of the bank (*u*). He must not keep it till the third day, and then present it, though by such a course it reach the drawee as soon as it would have done had it been despatched by post in the regular course (*x*).

(*q*) See the observations of Chancellor Kent, 3 Com. 104. These views have, in America, as well as in England, been confirmed by judicial decision; *Daniels v. Kyle*, 1 Kelly, 304. See Byles on Bills, 6th American edition, p. 37.

Where the holder neglected to present a cheque drawn in his favour by his debtor's agent, and the Court found that there was a reasonable probability that it would have been paid if duly presented, it was held that the debtor was discharged. *Hopkins v. Ware*, L. R., 4 Ex. 268.

(*r*) See *Bromley v. Brunton*, L. R., 6 Eq. 275; *Hewet v. Kaye*, 6 Eq. 198; and Chapter XI., DONATIO MORTIS CAUSA, and ante, p. 20.

(*s*) *Boddington v. Schlenker*, 4 B. & Ad. 752; 1 N. & M. 540; 38 R. R. 360; *Alexander v. Burchfield*, 1 Car. & M. 75; 3 Scott, N. R. 555; 7 M. & G. 1067; *Hare v. Henty*, 30 L. J., C. P. 302.

A banker receiving a draft from a customer incurs no liability to the customer in case it prove unproductive, unless he have been guilty of laches, *Gaden v. Newfoundland Bank*, Priv. C. Ap., Feb. 24th, [1899] still he is considered to be armed with the powers of a holder for value so far as other parties are concerned, e.g., for enlarging the time for presentment, giving notice of dishonour, whether or not the customer's account be overdrawn. *Ex parte Richdale*, 19 Ch. D. 409.

(*t*) *Rickford v. Ridge*, 2 Camp. 537; *Bond v. Warden*, 1 Collyer, 583; *Hare v. Henty*, 30 L. J., C. P. 302. This rule applies also *prima facie* between banker and customer (*ibid.*).

(*u*) *Moule v. Brown*, 4 Bing. N. C. 266; 5 Scott, 694. A country banker may use the clearing house. *Wilts and Dorset Bank v. Cook*, 53 J. P. 791.

(*x*) *Beeching v. Gower*, Holt's N. P. C. 313; 17 R. R. 644.

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But where a cheque, instead of being presented for payment in due course, is transferred and circulates through several hands, it is conceived that there is a distinction between the time of Presentment necessary as against the original drawer, in the event of the banker's insolvency and the time necessary to charge the person from whom the cheque was immediately received. The liability of the drawer cannot, it is apprehended, be enlarged by circulating the cheque, and, therefore, in order to charge *him*, if the banker fail, the cheque, in whose hands soever it be, must be presented within the period within which the payee or first holder must have presented it, but as against the party transferring the cheque to the holder, it is sufficient, whatever be the date of the cheque, to present it or forward it for presentment on the day next after the transfer.

As between the holder and a transferor who is not the drawer.

As to the consequences of non-presentment, the circumstances which will be evidence of presentment, or which will excuse or waive non-presentment, the reader is referred to the Chapter on PRESENTMENT FOR PAYMENT.

When a cheque is overdue it can only be negotiated subject to such defects of title as affected it at its maturity, and no transferee can acquire or give a better title than his transferor had (*y*). A cheque will be deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time is a question of fact (*z*). The tendency of later cases seems to be to treat cheques with more leniency than bills, especially if the latter be payable at a fixed period, and an interval of six (*a*) or eight (*b*) days has been held not to be an unreasonable length of time.

Overdue cheque.

Cheques, being intended for immediate payment on being presented, are not usually accepted. It has been said, however, that the custom of London bankers to mark cheques as good is equivalent to acceptance, and binds the banker to pay the cheques so marked (*c*). And no doubt formerly the mark was an acceptance of which any holder of the cheque might have availed himself, provided the mark amounted to a writing within the 1 & 2 Geo. 4, c. 78, s. 2. But since the 19 & 20 Vict. c. 97, s. 6, 41 Vict. c. 13, and

What amounted to an engagement by the drawee to pay a cheque.

(*y*) Sect. 36 (2).

(*z*) Sect. 36 (3).

(*a*) *Rothschild v. Corney*, 9 B. & C. 388; 4 M. & R. 411; 1 D. & L. 325; 33 R. R. 209.

(*b*) *London and County Bank*

v. Groom, 3 Q. B. D. 288; 51 L. J. 224. And see post, Chapter on NEGOTIATION.

(*c*) *Robson v. Bennett*, 2 Taunt. 388; 11 R. R. 614; and see 2 M. & Rob. 454, note.

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Code, 17(2) a, an acceptance must be signed. If it so happen that the drawee of the cheque is the banker of the holder, as well as of the drawer, no promise by the banker to pay the cheque will be implied by his receiving the cheque from the holder without observation, and keeping it till the following day (*d*), for *primâ facie* he will be taken to have received it as the holder's agent (*e*).

What a
cheque is
evidence of.

A cheque presented and paid is no evidence of money lent or advanced by the banker to the customer (*f*). On the contrary, it is *primâ facie* evidence of the repayment, to the amount of the cheque by the banker to the customer, of money previously lodged by the customer in the banker's hands. A cheque, not presented, is not evidence of money previously lent to the drawer by the payee (*g*). In other words, the mere circumstance of one man drawing a cheque in favour of another is no evidence of a debt due from the drawer.

When a
cheque
amounts to
payment.

A cheque, unless dishonoured, is payment (*h*). But upon a question whether a debt have been paid, the mere production of a cheque drawn by the debtor in favour of the creditor and paid by the banker is no evidence of payment (*i*). It must be further shown that the cheque passed through the creditor's hands. For this purpose, it is prudent to cause the payee to write his name across the cheque or to indorse it (*k*). But it is not necessary to go on and show that the debtor paid the cheque to the creditor (*l*).

(*d*) *Boyd v. Emmerson*, 2 A. & E. 184.

(*e*) And see *Kilsby v. Williams*, 5 B. & Ald. 816; 1 D. & R. 476; 24 R. R. 564.

(*f*) *Fletcher v. Manning*, 12 M. & W. 571.

(*g*) *Pearce v. Davis*, 1 M. & Rob. 365; and see *Aubert v. Walsh*, 4 Taunt. 293; 12 R. R. 651; *Cary v. Gerrish*, 4 Esp. 9.

(*h*) *Pearce v. Davis*, 1 M. & Rob. 365; *Carmarthen Rail. Co. v. Manchester Rail. Co.*, L. R., 8 C. P. 685; see *Moore v. Barthrop*, 1 B. & C. 5; 2 D. & R. 25. Where a cheque was given by a debtor to a mutual agent for both debtor and creditor, and the agent desired it to be crossed with the name of his own banker, who stopped the proceeds, it was held by the Court of Error, reversing

the decision of the majority of the Court of Common Pleas, to be a good payment. *Bridges v. Garratt*, L. R., 4 C. P. 481; 5 C. P., in error, 451; 39 L. J. 251. *Pape v. Westacott*, 1894, 1 Q. B. 272, was distinguished from *Bridges v. Garratt*, as the cheque given to the agent was not honoured. The payment relates to the time of delivery. *F. Hadley & Co. v. F. Hadley*, 1898, 2 Cha. 680.

(*i*) *Egg v. Barnett*, 3 Esp. 196; *Pearce v. Davis*, *supra*; *Lloyd v. Sandilands*, Gow, 15; 19 R. R. 507.

(*k*) *Aubert v. Walsh*, 4 Taunt. 293; 12 R. R. 651; *Lloyd v. Sandilands*, Gow, 15; 19 R. R. 507.

(*l*) *Mountford v. Harper*, 16 M. & W. 825; *Boswell v. Smith*, 6 C. & P. 60.

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When the acceptor or other party liable on a bill proposes to pay by a cheque, the holder should not give up the bill till the cheque is paid (*m*). It has, however, been held that the holder is not guilty of neglect in giving up the bill before the cheque is paid (*n*); but it is believed not to be usual at this day with London bankers to exchange bills for cheques, and it is doubtful whether they would now be protected in so doing. If a creditor, however, in payment of any other debt than a bill or note, take a cheque, and the banker fail, or the cheque be dishonoured, the creditor's remedies remain entire (*o*).

When it may
be taken in
payment.

It has been said that the holder of an unpaid cheque, as assignee of a chose in action, has an equitable claim on the drawee, and in the event of his bankruptcy may prove under the fiat (*p*). But in America it has been held that a cheque is not an equitable transfer by the drawer of a part of the debt due to him from the banker, and the decisions of the English Courts and the Code are to the same effect (*q*).

Whether
holder of
cheque be
assignee of
a chose in
action.

If the sum for which the customer drew the cheque be fraudulently altered and increased, and the banker pay the larger sum, he cannot charge his customer with the excess, but must bear the loss (*r*). But should any act of the drawer himself have facilitated or given occasion to the forgery he must bear the loss himself. A customer of a banker, on leaving home, entrusted to his wife several blank forms of cheques, signed by himself, and desired her to fill them up according to the exigency of his business.

Of fraud in
filling up
cheques.

(*m*) *Marius*, 21; *Ward v. Exans*, 12 Mod. 521; *Vernon v. Borerie*, 2 Show. 296; *Nash v. De Freville*, ~~Q. B. D., March, 1899.~~

(*n*) *Russell v. Hankey*, 6 T. R. 13; 3 R. R. 102; *Ridley v. Blakett*, Peake's Add. C. 62.

(*o*) *Everett v. Collins*, 2 Camp. 515; 11 R. R. 785; *Dent v. Dunn*, 3 Camp. 296; 13 R. R. 809; *Marsh v. Pedder*, Holt, 72; 4 Camp. 257; *Tapley v. Martens*, 8 T. R. 451; *Wyatt v. Marquis of Hertford*, 3 East, 147.

(*p*) In *Fry and Chapman's* bankruptcy, in the year 1829, several holders of cheques on the bankrupts claimed to prove, alleging that they were equitable assignees of choses in action. The

commissioners took time to consider, and afterwards disallowed the claim. See, too, *Ex parte Shellard*, L. R., 17 Eq. 109.

(*q*) Code, s. 53 (1). *Ballard v. Randall*, 1 Gray, 605; *Shand v. Du Buisson*, L. R., 18 Eq. 283; *Hopkinson v. Forster*, 19 Eq. 74; *Bank of Louisiana v. Bank of New Orleans*, L. R., 6 H. of L. 352. A banker's deposit receipt, though not transferable, still less negotiable, may be equitably assigned. *Ex parte Griffin*, 79 L. T. 442.

(*r*) *Hall v. Fuller*, 5 B. & C. 750; 8 D. & R. 464; 29 R. R. 383; *Smith v. Mercer*, 6 Taunt. 76; 1 Marsh. 453; 16 R. R. 576.

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She filled up one with the words *fifty-two pounds two shillings*, beginning the word *fifty* with a small letter in the middle of a line. The figures 52 : 2 were also placed at a considerable distance to the right of the printed £. She gave the cheque, thus filled up, to her husband's clerk, to get the money. He, before presenting it, inserted the words "*three hundred*" before the word *fifty*, and the figure 3 between the printed £ and the figures 52 : 2, so that it then appeared to be a cheque for 352 : 2. It was presented, and the bankers paid it. Held, that the improper mode of filling up the cheque had invited the forgery, and therefore, that the loss fell on the customer and not on the banker (s).

Branch banks.

Branches of the same banking company in different towns are for many purposes distinct. They may give notices of dishonour to each other, and a cheque upon one, when cashed by another, may be considered as transferred and not paid (t). But a balance at one branch may be applied in reduction of an overdrawn account at another, even without notice to the customer (u).

When several must join in drawing cheque.

When a plurality of persons, not being persons in trade, have money in a bank, they must each sign the cheque. If one abscond, equity would relieve the others, and assist them to get the money (x).

where several persons draw cheque the bank can open a joint account, pay it, & hold the drawers jointly & severally liable (s)

From what period bankers should debit their customers with cheques.

It has not been unusual for bankers to enter cheques in the pass-book as of the date when they were drawn, and not as of the date when they were actually paid, and to calculate interest accordingly. But a banker should debit his customer, not from the date of the cheque, but from the time of payment (y).

Cheques not protestable.

The 9 & 10 Will 3, c. 17 (repealed by the Code), applied only to bills of exchange payable *after date*. Cheques, therefore, were never required to be protested or noted, though

Overruled in Colonial Bank of Australasia v. Marshall [1906] A.C. 559. Drawers held liable for original amount only. ib. P.C.

(s) *Young v. Grote*, 4 Bing. 253; 12 Moore, 484; 29 R. R. 552. But this case has been much criticized, and nowhere more than in *Scholfield v. Londrsborough*, 1896, Ap. Ca. 515; 65 L. J. 593.

(t) *Clode v. Bailey*, 12 M. & W. 51; *Woodland v. Fear*, 26 L. J., Q. B. 202; 7 E. & B. 519; *Prince*

(p) *Henderson v. Wallace & Pennell* 5 F. 166.

v. Oriental Bank, L. R., 3 Ap. 325.

(u) *Garnett v. McKewan*, L. R., 8 Ex. 10.

(x) *Ex parte Hunter*, 2 Rose, 363. See post, Chapter on PAYMENT.

(y) *Goodbody v. Foster*, Camb. Sum. Ass. 1831, Lyndhurst, C. B.

generally they fall within the other principles relating to notice of dishonour of bills of exchange (z).

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A stakeholder who cashes a cheque deposited with him is not, if the parties agreed to treat the cheque as money, guilty of a breach of duty (a).

Right to cash
a cheque.

A cheque was within the Bills of Exchange Act, 1855, 18 & 19 Vict. c. 67 (b); but the operation of this Act was suspended by Ord. II. r. 68, and now the Act itself is repealed by the Statute Law Amendment Act, 1883, 46 & 47 Vict. c. 49, s. 3, as to actions in the High Court.

Within Bills
of Exchange
Act.

A cheque may be taken in execution (c).

Execution.

The statute 16 & 17 Vict. c. 59, s. 19, first introduced drafts on a banker payable *to order* on demand.

Cheques pay-
able to order.

The statute enacts, that the banker who pays the bearer is not to be responsible for the genuineness of the indorsement, as he would have been if it were an ordinary bill of exchange, but, on the other hand, the bearer cannot charge the drawer without making title through the first indorsement as he could on an ordinary cheque payable to bearer (d). An indorsement by an agent in fraud of his principals is within this section (e).

Protection to
banker pay-
ing.

(z) Code, s. 73; *Grant v. Vaughan*, 3 Burr. 1516. See the remarks of Lord Ellenborough in *Rickford v. Ridge*, 2 Camp. 539; Byles on Bills, 6th American ed., 37 and 445; Code, ss. 48 and 73. It has been already noticed that the Code in defining a "cheque" does not use the word "inland"; hence if a cheque be drawn abroad and show that on its face, like any other foreign bill, it may require to be protested or noted in addition to the notice of dishonour in order to preserve the remedies against the drawer and indorsers. Code, s. 51 (2). Whatever excuses notice of dishonour also excuses protest. Sect. 51 (9) and 50 (2) c. As to the stamp, see, however, *Ex parte Boyse*, 33 Ch. D. 612.

(a) *Wilkinson v. Godefrey*, 9 Ad. & E. 536.

(b) *Eyre v. Walker*, 29 L. J., Ex. 246; 5 H. & N. 460. This statute still applies to cases

involving 10*l.* or upwards in the County Courts. See Orders in Council of 30th Jan. 1856, and 27th July, 1863. See post, Chapter on ACTION. Formerly, a cheque like a bill or note might be referred to a master to compute principal and interest. *Bentham v. Lord Chesterfield*, 5 Scott, 117. But since 15 & 16 Vict. c. 76, s. 93, judgment by default in case of a debt or liquidated demand has been final. Ord. XIII. r. 3. But such a judgment is interlocutory so far as appeals are concerned. *Discount Co. v. Lagrange*, 3 C. P. D. 67.

(c) 1 & 2 Vict. c. 110, s. 12; *Watts v. Jefferies*, 3 Mac. & G. 422; 15 Jur. 435.

(d) The banker only is protected, not third parties. *Ogden v. Benas*, L. R., 9 C. P. 513; *Arnold v. Cheque Bank*, 1 C. P. D. 578.

(e) *Charles v. Blackwell*, 2 C. P. D. 151.

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Extended to
bills on de-
mand.

A similar protection is also accorded by the Code, s. 60, to a banker paying in good faith, and in the ordinary course of business a bill of exchange drawn on him payable to order on demand ; he is not responsible for the genuineness or validity of any indorsement, and is deemed to have paid the bill in due course though the indorsement be a forgery or without authority.

A banker's draft payable to order is now very commonly used for remittances by post or otherwise. No innocent transferee for value can succeed in an action against the drawer, unless he derive title through the payee's indorsement. The drawer is therefore, in an action against himself, on the cheque, protected by the ordinary consequences of forgery, civil and criminal. While in an action by himself against his own banker for the balance of his account, the banker, when he sets up as an answer the payment of the cheque, is at all events in no better position than he would have occupied had the cheque been originally made payable to bearer. Indeed, cases may be imagined in which the forged indorsement may assist the drawer in proving collusion or gross negligence against the banker.

Crossed
cheques.

It has long been a common practice, not only in the city of London but throughout England, to write across the face of a cheque the name of a banker. The *meaning* of this crossing was to direct the drawees to pay the cheque only to *the* banker whose name was written across ; and the *object* was to invalidate the payment to a wrongful owner in case of loss : but it has been held that at common law the *effect* is to direct the drawees to pay the cheque not to any particular banker, but only to *some* banker, and not to restrict its negotiability. Therefore, as between the banker and his customer, the circumstance of the banker paying a crossed cheque, otherwise than through another banker, is at common law strong evidence of negligence on the part of the banker, rendering him responsible to his customer (*f*). The holder may at common law erase the name of the banker and either substitute that of another banker, or leave the words *and Co.* remaining alone (*g*). It is also not unusual to write the words *and Co.* only, in the first instance, leaving the particular banker's name to

(*f*) *Bellamy v. Majoribanks*, 7 Exch. 389 ; *Carlton v. Ireland*, 25. L. J., Q. B. 113 ; 5 E. & B. 765.

(*g*) *Stewart v. Lee*, 1 M. & M. 158 ; *Bellamy v. Majoribanks*, supra. But see 21 & 22 Vict. c. 79 infra.

be filled up afterwards or not, so as to insure the presentment by some banker or other (*h*).

The former Acts regulating crossed cheques were repealed, and substantially re-enacted by the 39 & 40 Vict. c. 81, existing rights being preserved (*i*), which Act also is now

(*h*) *Boddington v. Schlenker*, 4 B. & Ad. 752 ; 1 N. & M. 540, S. C. ; 38 R. R. 360 ; *Carlton v. Ireland*, supra. C. drew a cheque on his banker, payable to A. and B., assignees of C., or bearer, and wrote the name of their bankers across it. B., who had another private account with the banker, paid the cheque into that account: it was held, that the bankers were justified in applying it to that account, the drawer's writing the name of the bankers of the payees of the cheque across it not being, according to the custom of trade, information to the bankers that the money was the money of the payees.

(*i*) Those Acts were the 19 & 20 Vict. c. 25, and the 21 & 22 Vict. c. 79. The former of these enacted that where a draft payable to bearer, or order, on demand, bore across its face the name of any banker, or the words "and Co." between two transverse lines, such draft should only be paid to or through some banker, but the negotiability of the cheque was not affected. The Court of Common Pleas in *Simmons v. Taylor*, 27 L. J. 45 ; 4 C. B., N. S. 463, held that under this Act the crossing was no part of the cheque, and its fraudulent alteration no forgery, and, therefore, that the payment without negligence to a holder, not being a banker, of a draft, the crossing whereof had been fraudulently obliterated, was good as between the banker and his customer. The 21 & 22 Vict. c. 79, accordingly, enacted that the crossing should be a part of the cheque, and its fraudulent obliteration or alteration forgery. That a cheque once crossed with a banker's name was thenceforth only payable through him, and further,

that payment made without negligence of a draft, the crossing of which had been obliterated or altered, should not be questioned. Neither of these Acts affected the negotiability of cheques, so that a payment made to a wrong banker, provided it reached the rightful holder, was good. *Smith v. Union Bank*, L. R., 1 Q. B. D. 31 ; 45 L. J. 49 ; where a crossed cheque indorsed in blank was stolen, and ultimately presented by a *bond fide* holder through another bank than that named in the crossing. The drawees, who paid it in disregard of the statute, were held not to be liable in an action at the suit of the loser, as he was not the holder, nor was there any privity of contract or statutory duty as between him and them ; and his loss was in no way occasioned by their act, inasmuch as they had paid the rightful owner, though through a wrong channel. This case led to the passing of the late stat. 39 & 40 Vict. c. 81.

It is conceived that it always has been competent for a man to draw a non-transferable cheque ; this he could formerly have done by simply omitting the words "order or bearer" in which case the payee could indorse so as to make himself, but not the original drawer, liable to the indorsee. Now, however, as those words are no longer necessary to create negotiability, it follows that their mere absence will not restrain it ; and, accordingly, if a man wishes to draw or indorse an instrument so that its negotiability is restrained, he must use words expressing that intention, as "pay D. only," or "pay D. for such-and-such an account." Code, ss. 8 and 35. In the *National Bank v. Silke*, 1891, 1 Q. B. 435 ; 60 L. J. 199, the Court, while

as the bank credited him
with negligence

Of a Cheque on a Banker.

111.

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repealed and the provisions in the Code substituted in its place.

Not negotiable cheques.

The 39 & 40 Vict. c. 81, first introduced "not negotiable" cheques, that is to say, instruments which are freely transferable, but to which a *bonâ fide* holder for value does not acquire a new and independent title, but can only have or pass on such title as his transferor possessed (*k*). This provision must greatly lessen, if it does not entirely remove, risk from theft or loss, as a thief or finder can have no title, and therefore cannot convey one.

The present law as to crossed cheques.

The 76th and six following sections of the Code contain the present law, which seems to apply equally to cheques to order and to bearer, as the words used are "a cheque." The Act of 1876 expressly included both by sect. 3.

Two parallel lines across the face of a cheque, whether containing or not the words "and Co." and with or without the words "not negotiable," constitute a general crossing (*l*).

If the name of a banker be written across the face of a cheque, with or without the words "not negotiable," that cheque is crossed specially and to that banker (*m*).

Either the drawer or the holder may cross generally or specially, and the latter may convert a general into a special crossing, or add the words "not negotiable" (*n*) if he choose, when the drawer has not done so. A banker, to whom a cheque either uncrossed or crossed generally is sent for collection, may cross it specially to himself (*o*); but a banker alone can recross specially to another banker for collection a cheque already crossed specially (*p*).

doubting whether a cheque to order or bearer could be rendered not negotiable otherwise than as provided by the Code itself, s. 76; held, that a mere mention in the crossing of the account to be credited was at all events insufficient to make it so. The case of *Bobbett v. Pinkett*, L. R., 1 Ex. Div. 368, was more a question of parties than of law, as the drawer, and not the payee, was suing an innocent holder for the proceeds of a cheque that had been stolen, and bore a forged indorsement.

(*k*) Code, s. 81, is to the same effect.

(*l*) Code, s. 76. It seems that

only crossed cheques can be marked "not negotiable," as both this and the following sections 77 (4) and 81 only authorize the insertion or subsequent addition of those words where cheques are crossed, but it is immaterial whether the crossing be general or special.

(*m*) Sect. 76 (2). The two parallel transverse lines seem therefore not to be absolutely necessary in the case of a special crossing, though it is usual to add them.

(*n*) Sect. 77 (1), (2), (3), (4).

(*o*) *Ib.* (6).

(*p*) *Ib.* (5).

(2) The Sect. of the pages Co indorsed a cheque with their name & his own as "Sect.", & paid it into his own a/c. He had had no previous cheques of the Co. into his a/c. The bank credited him without enquiry, & collected from the paying bank. Held not "without negligence" Hannan's Bank v. Central v. Armstrong & Co. 5 Com. Cas. 188. Kennedy. (1900) Dig.

Of a Cheque on a Banker.

31

In any other case where a cheque is crossed specially to more than one banker, the drawee is to refuse payment (q), or he will be liable to the true owner for any loss occasioned thereby; and so, too, if he pay a cheque crossed generally otherwise than to a banker, or one crossed specially otherwise than to that banker, or to his agent for collection, being also a banker (r).

CHAPTER III.

Liability of banker.

Where a banker pays in good faith and without negligence a cheque that does not appear to be crossed, or to have had the crossing obliterated, or wrongfully added to, or altered, he incurs no liability, nor is the payment to be called in question for not having been made either to a banker or to the banker named in the crossing, or his agent for collection (s).

Protection to banker.

A banker paying a crossed cheque in good faith and without negligence, and with due regard to the crossing, is to be placed in the same position as if the true owner had been paid; and so, too, the drawer, if the cheque has come into the hands of the payee (t).

A banker *bonâ fide* receiving payment for a customer of a cheque crossed either generally or specially to himself, shall not, in case the customer's title to the cheque prove defective, incur any liability to the true owner of the cheque, by reason only of having received such payment (u).

(q) Sect. 79 (1).

(r) Sect. 79 (2).

(s) Ib.

(t) Sect. 80.

(u) Sect. 82. See the judgment of Lindley, J., in *Matthiesson v. London and County Bank*, L. R., 5 C. P. D. 7 (a case under the repealed statute), as to what conduct of a banker would amount to more than merely receiving such payment. In *Kleinwort v. The Comptoir D'Escompte de Paris*, 1894, 2 Q. B. 157; 63 L. J. 674, the collecting bankers who received the money and paid it, not to a customer, but a stranger claiming under a forged indorsement, were held liable for a "conversion." In *La Caze v. The Credit Lyonnais*, 66 L. J. 326; 1897, 1 Q. B. 148, where the defendants were bankers in London and Paris, a cheque crossed generally, drawn on the London branch, was lost in the

post, and presented at the Paris branch (in which country crossings are not recognized) by a stranger claiming under a forged indorsement. The cheque was forwarded to the London branch, who, suspecting no fraud, debited the drawer's account, credited their Paris branch, and advised the latter to pay, which they did. It was held that these transactions amounted to a payment in England to be governed by English law, that the defendants were but one bank, and having paid as drawees to themselves as collecting bankers, not for a customer, but for a stranger, were liable to the true owner for a conversion. So a banker, if he have no notice of a trust, is entitled to set off money received for his customer against an overdraft, or a balance on one account against an overdraft on another. *Thomson v. Clydesdale Bank*,

cf. 16417 Vict. c. 59.

includes person opening a/c by paying in cheque in question. [1900] A.C. 683

A former years cashier, now cashier at a bank where he has no a/c. A customer of W. R. v. London & County Bank. [1900] A.C. 444

a banker who makes himself a holder for value, e.g. by indorsing the customer, is not protected.

A cheque crossed by the recipient banker is not a "crossed" cheque. *Capital & Counties Bank v. Gordon* [1903] A.C. 244

a banker who has a customer cheques crossed generally, of which the indorsements were forged, then credited him in the books, crossed the cheques specially to other bankers, with directions to pay to the a/c. On hearing, the bank had been duly credited by credit of customers in his pass book & the drawee a/c. Held a "receiving payment." *Abraham v. National Bank* [1900] A.C. 465. *Rejoice*

when the banker receives pay for a customer of a crossed cheque "a/c payee" it may be negligence if he has reason to think he is paying the proceeds to a/c w. is not the payee's a/c. *Brown v. National Bank*. 23 T. L. R. 66.

CHAPTER
III.

A person taking a crossed cheque marked "not negotiable" has not, nor can he give, a better title than his transferor had (*x*).

Crossing is a material part.

The crossing constitutes a material part of the cheque, and no one may obliterate it, or add to it or alter it, save as authorized by the Code (*y*).

Dividend warrants.

Warrants for the payment of dividends may be crossed like cheques, and with the same results (*z*). They are frequently transferred by indorsement and delivery like bills, and any usage relating to them remains unaffected by the Code (*a*).

Postal orders.

Orders for a small amount, not exceeding 20s., are now issued payable on demand at any time within three months (or later on payment of a commission) at any post office. No stamp is required, but a poundage duty is paid, together with the principal sum at the time of issue. The sender must fill in the payee's name, and one or other of these two the name of the office where it is to be payable. They may be crossed either generally or specially. Forgery or fraudulent alteration is felony; and if the order be cut, defaced, or mutilated, or any erasure or alteration be made, payment may be refused. A banker receiving payment for a principal on any such order or document purporting to be such order, is not thereby rendered liable to any one except his principal, but this protection does not extend to the latter (*b*).

The Cheque Bank.

As we have already seen, the holder of a cheque cannot enforce payment from the bank, and he practically takes it

1893, Ap. Ca. 282; *Coleman v. Bucks and Oron. Bank*, 1897, 2 Cha. 243; and s. 82 in no way curtails this right. *Clarke v. London and County Bank*, 1897, 1 Q. B. 552; 66 L. J. 354. As to a "customer" see *Matthews v. Brown*, 10 T. L. R. 386.

(*x*) Sect. 81. It is believed that this is the only case in which a holder in due course does not get a new and independent title, and have every presumption as to the liability of antecedent parties irresistibly drawn in his favour.

(*y*) Sect. 78. An alteration, therefore, in the crossing may avoid the instrument (sect. 64),

and if made fraudulently subject the person so doing to the penalties on forgery. See 24 & 25 Vict. c. 98, s. 22. Though Code, s. 64, does not mention the crossing of a cheque in recapitulating the material parts of a bill.

(*z*) Sect. 95.

(*a*) Sect. 97 (3) (d).

(*b*) 43 & 44 Vict. c. 33; amended and extended to British foreign dominions by 46 & 47 Vict. c. 58. A banker receiving post office orders from a customer has no better title to the proceeds when cashed than the customer, and is liable to the true owner for them. *Fine Art Society v. Union Bank*,

on the faith of the drawer's solvency, or of other parties thereto (*c*). The object of the Cheque Bank Company was to make it morally certain that a cheque drawn on them would not be dishonoured for want of funds. To effect this the contract between them and their customers differs from the ordinary one, inasmuch as it is stipulated that cheques shall not be drawn upon them save upon their own blank forms issued for that purpose, each of which notifies the maximum amount for which it may be drawn. As these forms are not issued until funds to meet them have been deposited with the bank, and those funds can only be drawn out by using the forms, it follows that funds must be lying at the bank ready to meet each outstanding form. Accordingly, it is found that they pass readily even in places where the drawer is not known, and afford a great convenience to those away from home.

Cheques are not accepted, hence the holder cannot sue the bank. The drawer is not discharged by the holder's failure to present in due time, unless the bank fail. Notice of dishonour to the drawer is rarely legally necessary, as absence of effects in the drawee's hands, the almost universal cause of dishonour, excuses it, as does countermand of payment (*d*). They must be drawn on a banker, and payable on demand, and are generally, though not necessarily, inland. And finally the banker is protected against a forged or unauthorized indorsement of a draft on him to order on demand.

Summary of
chief points
of difference
between
cheques and
bills.

17 Q. B. D. 705. The banker may sign the receipt clause instead of the payee.

(*c*) To issue the cheques accepted, so that the holder could sue the bank, would probably be an infringement of the Bank Charter Act. See post, Chapter V.

(*d*) It may be extremely advisable to give it, however, as it, or the facts that dispense with it, must be alleged in the special indorsement on the statement of claim. *Fruhauf v. Grosvenor*, 61 L. J. Q. B. 717.

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OF AN I O U.

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IV.

What it is.

A MERE acknowledgment of a debt does not amount to a promissory note.
Such an acknowledgment is frequently made in an abbreviated form, thus,

London, 1st January, 1866.

Mr. A. B.

I O U £100.

C. D.

An acknowledgment of a debt in this form is called an I O U. It is evidence of an account stated, but not of money lent (a).

Requires no
stamp.

Not amounting to a promissory note (b), and being merely evidence of a debt due by virtue of some antecedent contract, it requires no stamp (c). Nor indeed is a stamp required for any instrument which is merely an acknowledgment of money deposited to be accounted for, and not a receipt for money antecedently due (d). Therefore

(a) <i>Fesenmayer v. Adcock</i> , 16 M. & W. 449.	D. & R. N. P. C. 8; <i>Beeching v. Westbrook</i> , 8 M. & W. 412.
(b) But if the consideration be stated, it has been held in America to be a promissory note. <i>Fleming v. Burge</i> , 6 Alabama, 373.	(d) <i>Tomkins v. Ashby</i> , 6 B. & C. 541; 9 D. & R. 543; 1 M. & M. 32; <i>Casborne v. Dutton</i> , Selwyn's N. P., 12th ed., 426; <i>Payne v. Jenkins</i> , 4 C. & P. 324; 34 R. B. 809; <i>Hopkins v. Abbott</i> , L. R., 19 Eq. 222.
(c) <i>Fisher v. Leslie</i> , 1 Esp. 425; <i>Israel v. Israel</i> , 1 Camp. 499; 10 R. B. 737; <i>Childers v. Boulnois</i> ,	

a paper stating that the party signing it had certain bills in his hands, which he held to get discounted or return on demand, requires no stamp (e).

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But if the I O U contain an agreement that it is to be paid on a given day or on demand, it will be a promissory note, and must be stamped as such. And if the contracting words be such as to make it not a promissory note, but an agreement, it must be stamped accordingly (f), unless it be under 5*l.* in amount (g).

Unless it
amount to a
note or agree-
ment.

The following instrument was held to be a mere I O U, not to be a promissory note, and to require no stamp: "1839, Nov. 11, I O U forty-five pounds thirteen shillings, which I borrowed of Mrs. Melanotte, and to pay her five per cent. till paid" (h). An instrument in this form, "I owe Mr. John Gould the sum of 200*l.* for value received," requires no stamp (i).

It is conceived that a mere I O U, given by a surety for the debt of another man, is void by the Statute of Frauds (k). But perhaps the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 3), which removes the necessity of the consideration appearing in writing, may obviate the objection (l).

An I O U ought regularly to be addressed to the creditor by name; but though not addressed to any one it will be evidence for the plaintiff if produced by him (m). This rule was convenient and safe. For, before the alteration of the law making parties to the action competent witnesses, if the I O U were given (as it often is) when no one but the plaintiff and defendant were present, it would have been impossible for the plaintiff to prove

Need not be
addressed to
the creditor.

(e) *Mullett v. Hutchison*, 3 C. & P. 92; 7 B. & C. 639; *Langdon v. Wilson*, 2 Man. & R. 10; *Williamson v. Bennett*, 2 Camp. 417; *Horne v. Redfearn*, 4 Bing. N. C. 433; 6 Scott, 260.

(f) *Brooks v. Elkins*, 2 M. & W. 74.

(g) *Evans v. Phillpotts*, 9 C. & P. 270; 23 Vict. c. 15; 33 & 34 Vict. c. 97, Sched.

(h) *Melanotte v. Teasdale*, 13 M. & W. 216; *Smith v. Smith*, 1 F. & F. 539.

(i) *Gould v. Coombs*, 14 L. J., C. P. 175; 1 C. B. 543.

(k) So held by the Court of Exchequer in 1845. Admitted by counsel to be so. And see *Gould v. Coombs*, 14 L. J., C. P. 175; 1 C. B. 550.

(l) An I O U jointly signed by debtor and surety was held evidence of a joint account stated with creditor. *Buck v. Hurst*, L. R., 1 C. P. 297.

(m) *Curtis v. Rickards*, 1 M. & G. 46; 1 Scott, N. R. 155; *Douglas v. Holme*, 12 A. & E. 146; *Fisher v. Leslie*, 1 Esp. 427; *Fesenmayer v. Adcock*, 16 M. & W. 449.

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how he became possessed of it; but if the I O U were given to a third party the defendant had ordinarily the means of proving it.

Bill to discover consideration.

It has been held that a bill in equity would lie to discover whether an I O U were given for a gaming debt (*n*).

To restrain an action.

There are cases where the Court will restrain an action on an I O U (*o*).

(*n*) *Wilkinson v. L'Eaugier*, 2 Y. & Col. 366.

(*o*) *Quarrier v. Colston*, 12 L.J., Ch. 57; 6 Jur. 959.

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Who may
contract.

CAPACITY to incur liability as a party to a bill or note is co-extensive with capacity to contract; hence, in general, corporations, unless specially authorized so to do, infants, lunatics, married women not having a separate estate, cannot become liable as parties, Code, s. 22. But when a bill is drawn or indorsed by an infant, or by a corporation, not so authorized, the holder is entitled to enforce payment against other parties to the bill (*a*).

Signature
essential to
liability.

No person is liable as drawer, indorser, or acceptor, or maker of a bill, or note, unless he has signed it as such; but signing a trade or assumed name is as binding as a man's real name; and signing the name of a firm is equivalent to the signature by the person writing it of the names of all the partners (*b*).

Agents,

The signature need not be by the man himself, it may be written by the hand, or even in the name of a duly-qualified agent, for whatever a man may do himself

(*a*) Code, s. 22 (2). They may be channels to convey title and liability, though not to originate it, as the section makes no mention of acceptance, the primary contract on a bill, and hence by inference excludes the making, the primary contract on a note. Married women again are omitted, as if they possess a separate estate, their contracts *prima facie* relate to that, and if they do not,

they can only act as agents for their husbands. An infant in the Scotch law is termed a minor.

(*b*) Code, s. 23. If he have authorized another to accept in that other's name that will bind him, though his own do not appear. *Lindus v. Bradwell*, 5 C. B. 583. As to the liability of a transferor by delivery, see post, the Chapter on TRANSFER.

(except in virtue of a delegated authority) he may do by his agent (c).

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No particular form of appointment is necessary to enable an agent to draw, indorse or accept, or make bills or notes, so as to charge his principal ; he may be specially appointed for this purpose, or derive his power from some general or implied authority. And it is important to see that the ostensible do not exceed the actual authority, for if the principal's representations or acts give to the agent the appearance of an authority larger than the agent actually possesses, the principal may be bound by such of the agent's acts as, although beyond the line of the agent's actual authority, are still within the margin of the ostensible or apparent authority. And this, on the established and elementary principle, that untrue representations, on the faith of which a man induces a third person to act, bind the party making them.

how
appointed.

Subsequent recognition of an agent's acts is equivalent to previous authority ; provided the agent, when he acted, assumed to act as agent (d).

Ratification.

General authorities to transact business, and to receive and discharge debts, do not confer upon an agent the power of accepting or indorsing bills, so as to charge his principal (e). And special authorities to accept or indorse

(c) Code, s. 91. *Combi's case*, 9 Rep. 75 ; *Lindus v. Bradwell*, 5 C. B. 583. Disqualifications for contracting on a person's own account are not necessarily disqualifications for contracting as agent for another ; for an agent is considered as a mere instrument : therefore infants, married women, persons attainted, outlawed, or excommunicated, aliens and other persons labouring under disabilities, may be agents. Co. Lit. 52 (a). An infant, though he may be a private, cannot be a public, attorney at law to conduct suits. Ibid. 128 (a) ; Mir. C. 2, s. 21.

(d) Viner's Ab. Ratihabition ; *Saunderson v. Griffiths*, 5 B. & C. 909 ; D. & R. 643 ; *Vere v. Ashby*, 10 B. & C. 288 ; 34 R. R. 408. See the law of Ratihabition discussed in *Wilson v. Tummon*, 6 M. & G. 236, which is the leading case on the subject. See also *Ancona v.*

Marks, 31 L. J., Exch. 163 ; 7 H. & N. 686. In America it has been held that ratihabition will not relieve the agent from personal liability on a promissory note once incurred. *Rossiter v. Rossiter*, 8 Wendell, 494. A forged signature cannot be ratified. *Brook v. Hook*, L. R., 6 Ex. 89 ; 40 L. J., Ex. 50 ; but the Code, s. 24, impliedly recognizes the possible ratification of any unauthorized signature not amounting to forgery. To constitute forgery the act must be committed with a fraudulent intent. Bla. Com. iv., 247 ; vi., chap. 5, iii.

(e) *Hogg v. Snaith*, 1 Taunt. 347 ; 9 R. R. 788, and *Hay v. Goldsmid*, there cited ; *Murray v. East India Company*, 5 B. & Ald. 204 ; 24 R. R. 325 ; and see *Howard v. Baillie*, 2 H. Bla. 618 ; 3 R. R. 531 ; *Gardner v. Baillie*, 6 T. R. 591 ; 3 R. R. 531, 538 ;

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are construed strictly. A. B., who carried on business on his own account, and also in partnership, went abroad, and gave to certain persons in this country two powers of attorney; by the first of which, authority was given for him, and in his name and to his use, to do certain specific acts (and, amongst others, to indorse bills, &c.), and generally to act for him, as he might do if he were present; and, by the second, authority was given, "for him, and on his behalf, to accept bills drawn on him by his agents or correspondents." C. D., one of A. B.'s partners (and who acted as his agent), in order to raise money for payment of the creditors of the joint concern, drew a bill which the attorney accepted in A. B.'s name by procuration. In action against A. B., by the indorsee of the bill, held, first, that the right of the indorsee depended upon the authority given to the attorney; secondly, that the power applied only to A. B.'s individual, and not to his partnership affairs; thirdly, that the special power to accept extended only to bills drawn by an agent in that capacity; and that C. D. did not draw the bills in question as agent, but as partner; and, lastly, that the general words in the power of attorney were not to be construed at large, but as giving general powers for the carrying into effect the special purposes for which they were given (*f*). An authority to indorse bills remitted to the principal, gives no power to indorse a bill which the principal could not have indorsed without a fraud, and such an indorsement conveys no title even to a holder in due course (*g*). It would be otherwise had the principal himself indorsed (*h*).

When
authority may
be inferred.

An authority is often implied from circumstances; as if the agent has formerly been in the habit of drawing, accepting or indorsing for his principal, and his principal has recognized his acts. Thus, to an action against an acceptor of a bill, the defence was, that the drawer had forged the acceptor's signature, in answer to which it was proved that the defendant had previously paid such

Kilgour v. Finlayson, 1 H. Bla. 155; *Hay v. Goldsmid*, 2 Smith's Rep. 79; 9 R. R. 790; *Esdaile v. Lanauze*, 1 Y. & Col. 394; *In re Cunningham & Co.*, 35 Ch. D. 532; 57 L. J., Ch. 169; *Odell v. Cormack*, 19 Q. B. D. 223; 56 L. J., Q. B. 463. But where an agent managed a business and acted ostensibly as principal, it was held that he could bind his principal

by accepting a bill, even though expressly forbidden so to do. *Edmunds v. Bushell*, L. R., 1 Q. B. 97; 35 L. J., Q. B. 21.

(*f*) *Attwood v. Munnings*, 7 B. & C. 273; 1 M. & R. 78; 31 R. R. 194. See *Bank of Bengal v. M'Cleod*, 7 Moore, P. C. C. 35.

(*g*) *Fearn v. Filica*, 14 L. J., C. P. 15; 7 M. & G. 513.

(*h*) *Ibid.*

acceptances; and this was held proof of authority to the drawer (i).

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"It may be admitted," says Tindal, C. J., "that an authority to draw does not import in itself an authority to indorse bills; but still the evidence of such authority to draw is not to be withheld from the jury, where they are to determine on the whole of the evidence, whether an authority to indorse existed or not" (k). And therefore, from the facts that the defendants' confidential clerk had been accustomed to draw cheques for them, that *in one instance* they had authorized him to indorse, and in two other instances had received money obtained by his indorsing in their name, a jury was held warranted in inferring that the clerk had a general authority to indorse (l).

To draw and indorse.

The acceptance of a bill drawn by procuration is an admission of the agent's authority *to draw*, but no admission of his authority to indorse, though the indorsement were on the bill at the time of acceptance (m).

When admitted.

A forged or unauthorized signature is wholly inoperative, and gives no right to retain or discharge the bill, or enforce payment thereof, unless the party, against whom such right is sought, be precluded from setting up the forgery or want of authority (n).

Effect of a forged or unauthorized signature.

Where a person signs as drawer or indorser, or acceptor or maker, of a bill, or note, adding words indicating that

When agent liable.

(i) *Barber v. Gingell*, 3 Esp. 60; *Llewellyn v. Winckworth*, 13 M. & W. 598; *Cash v. Taylor*, Lloyd & Welsby, 178; 8 L. J., K. B. 262. But paying on one forged signature is no estoppel in the case of a second forged signature. *Morris v. Bethell*, L. R., 5 C. P. 47.

(k) *Prescott v. Flynn*, 9 Bing. 19; 2 Moo. & Sc. 22; 35 R. R. 508.

(l) *Ibid.*

(m) *Robinson v. Yarrow*, 7 Taunt. 455; 1 Moo. 150; 18 R. R. 537. See the Chapter on ACCEPTANCE. Code, s. 54 (2) b.

(n) *Roberts v. Tucker*, 16 Q. B. 560; *Fearn v. Filica*, 7 M. & G. 513; 14 L. J., C. P. 15; Code, s. 24. The other provisions of the

Code to which section 24 is subject seem to be section 60, protecting bankers paying drafts to order on demand of which the indorsement is forged; section 54, defining the contract of the acceptor, who is estopped from denying to a holder in due course the existence of the drawer, his capacity and authority to draw, and the genuineness of his signature; and section 55 (2), defining the contract of an indorser who is estopped as to signature of the drawer and all indorsements previous to his own. The agent himself, however, may be liable on an implied warranty of authority, see post, or perhaps under section 56.

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he signs for a principal, or as executor, &c., he is not personally liable thereon; but the mere addition of the words agent or executor is not sufficient to free him from liability (o).

Ambiguous
signature.

In determining whether a signature on a bill or note is that of the principal, or that of the agent who wrote it, the construction most favourable to the validity of the instrument shall be adopted (p).

Unauthorized
delivery.

The unauthorized indorsement of bills or notes, therefore, gives no title, unless the party against whom it is sought to enforce them, be estopped from setting up that fact; but the unauthorized delivery of bills or notes payable to bearer, gives a holder in due course a claim on the other parties (q).

But in any case, if the transferee know that the transferor has no right to pass the bills, he can acquire no property in them. Thus, where the plaintiff indorsed bills to A. B. specially in this form, "Pay A. B. or order, for account of plaintiff," and A. B. pledged the bills with defendant for his private debt, it was held, that the defendant took them with sufficient notice that they did not belong to A. B., and that defendant was liable to plaintiffs in an action of trover (r).

Pledging.

An agent, who receives a bill for the purpose of getting it discounted, has no right to pawn it for a sum smaller than the amount of the bill, minus the discount, for his employer

(o) Probably the words "as agent only" or "as executor only," would be sufficient to negative his personal liability. The usual term to employ in an indorsement by an agent is "*sans recours*," or "without recourse," "to me" being understood. Code, s. 26 (1).

(p) Code, s. 26 (2). For instance, a bill cannot be accepted (except for honour) by any other person than the drawee. *Nichols v. Diamond*, 9 Ex. 157. Code, ss. 6 and 17. Hence the presumption most favourable to the instrument would be, in the case of acceptance by agency, that the signature was that of the principal, as otherwise the acceptance would be void. But the agent may be personally liable, possibly

under s. 56, or on the implied warranty of authority. *Fearn v. Filica*, 7 M. & G. 513; 14 L. J. 15. An agent who exceeds his authority in negotiating an overdue bill conveys no other title than that which he himself had. *Lee v. Zagury*, 8 Taunt. 114; 1 Moo. 556; 19 R. R. 476; Code, s. 36 (2). See post, Chapter on TRANSFER.

(q) Bayley, 106; *Miller v. Race*, 1 Burr. 452; *Lawson v. Weston*, 4 Esp. 56; *Raphael v. Bank of England*, 17 C. B. 161. See Chapter XI. on TRANSFER.

(r) *Treuttell v. Barandon*, 8 Taunt. 100; 1 Moo. 543. See the subject of restrictive indorsements more fully treated in the Chapter on TRANSFER.

may, by the pawnee's detention of the bill, or by his change of residence, or by its further negotiation, be prevented from raising on the bill its full value, and yet be exposed to pay its full amount to a subsequent holder in due course.

An agent or bill broker, intrusted to discount, has no right to pledge the bill as a security for money previously due from himself. And it is very doubtful whether an usage entitling him to do so would be legal (*s*). *Primâ facie*, a bill broker has no right to pledge the bills of his different customers in one mass, for that might subject a bill to a lien beyond the amount advanced upon it. But the usage of a particular district may enlarge the authority of a bill broker, and give him a right to pledge the bills of different customers in one mass (*t*). Such is the usage of bill brokers in the city of London, and it is not an unreasonable one, for although it may occasionally be attended with inconvenience, yet, on the other hand, the bill broker may often raise money on a large scale on better terms than on a small one, or discount, with other bills, bills which alone could not be discounted at all (*u*).

Bill brokers.

A signature by procuration operates as notice of a limited authority in the agent, and the principal is only bound if the agent was acting within his authority; hence, if an offer to accept, or draw, or indorse, be made by an agent, the holder may and should require the production of his authority, and if satisfactory authority be not produced, may treat the bill as dishonoured. "A person taking an

Procuration.

When the production of an agent's authority may be required.

(*s*) *Haynes v. Foster*, 2 C. & M. 237; 39 R. R. 765.

(*t*) *Foster v. Pearson*, 1 C., M. & R. 849; 5 Tyr. 255.

(*u*) "A bill broker is not a person known to the law with certain prescribed duties, but his employment is one which depends entirely on the course of dealing." *Foster v. Pearson*, 1 C., M. & R. 849. But in a recent case this very usage was relied on to show that the bankers must, under the circumstances, be taken to have had notice that the securities might not be the property of the pledger, and should have enquired into his authority so to deal with them; the banker's title being thus affected with notice, the

question of negotiability became immaterial, and the true owner was held entitled to redeem them on repayment to the bank of the amount actually advanced to him by the broker. *Sheffield, Lord v. London and Joint-Stock Bank*, L. R. 13 App. Cas. 333. But in *London and Joint-Stock Bank v. Simmons*, L. R., 1892, A. C. 201, the pledgee of negotiable instruments, who took in good faith and for value, was held to have a new and independent title even though he made no enquiry. See, too, *Venables v. Baring*, 1892, 3 Cha. 527; 61 L. J. 609; and *Bentinck v. London and Joint-Stock Bank*, 1893, 2 Cha. 120.

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acceptance importing to be by procuration," says Mr. Justice Bayley, "ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority (x). It has been doubted whether, in any case, a holder is bound to acquiesce in an acceptance by an agent, on the same principle that it has been held that a purchaser is not bound to accept a conveyance to be executed by a power of attorney, viz. that it will multiply the proofs necessary to sustain his title (y).

How determined.

The authority of an agent will be presumed to continue till due notice of its revocation has been given; and such notice should be, as to strangers, by publication in the *Gazette*; and, as to customers and correspondents, by express individual communication (z).

Delegated.

A mere agent cannot delegate his authority, unless specially authorized so to do (a).

Effect of notice to an agent.

The effect of notice to an agent of an infirmity in the title to a bill of exchange which he receives for his principal will be discussed in the Chapter on CONSIDERATION.

Personal liability of an agent to third persons.

An agent will be personally liable to third persons on his drawing, indorsing or accepting, unless he either sign his principal's name only, or expressly state in writing his ministerial character, and that he signs only in that character: "unless" to use the words of Lord

(x) Code, s. 25; *Attwood v. Munnings*, 7 B. & C. 278; 1 M. & R. 79; 31 R. R. 194; *Alexander v. Mackenzie*, 6 C. B. 766; 18 L. J., C. P. 94; *Stagg v. Elliot*, 31 L. J., C. P. 260; 12 C. B., N. S. 373. If the agent have any authority, his abuse of it will not affect a holder in due course. *Bryant, Powys & Co. v. Bank of Quebec*, 1893, Ap. Ca. 170. In *Reid v. Rigby*, 1894, 2 Q. B. 40; 63 L. J. 451, though the claim on a cheque drawn by the agent failed, it was held that any part of the proceeds actually received by the principal could be recovered as money had and received to the plaintiff's use. The Court of Exchequer seem

to have adopted a different rule in the case of a charter-party signed P. P. The words are usually abbreviated, and run thus, "Jones & Co. per proc. John Smith."

(y) See *Coore v. Callaway*, 1 Esp. 115; Chitty, 283.

(z) See *Newsome v. Coles*, 2 Camp. 617; 12 R. R. 756.

(a) *Coombe's case*, 9 Rep. 75; *Pallisser v. Ord*, Bunb. 166. But an authority to indorse may imply an authority to indorse by the hand of another in the agent's presence. *Lord v. Hall*, 9 L. J., C. P. 147; 8 C. B. 627; see also *Ex parte Sutton*, 2 Cox. 84.

Ellenborough (*b*), "he states upon the face of the bill that he subscribes it for another; unless he says plainly, 'I am the mere scribe.'"

Thus where the defendant, agent of a banker, drew the following bill: "Pay to the order of A. B. 50*l.*, value received, which place to the account of the Durham Bank, as advised," and subscribed his own name, it was held that the defendant was personally answerable and he alone, though the plaintiff, the payee, knew that he was only agent (*c*). So, if a broker draws upon the buyer of goods which he has sold for his principal in favour of the latter, to whom he indorses the bill, he is liable, as drawer, to his principal (*d*). A bill for 200*l.* was drawn upon the defendant by the description of "Mr. H. Bishop, *Cashier of the York Buildings Company, at their house in Winchester Street, London*;" and the bill directed him to place the 200*l.* to the account of the company. The letter of advice from the drawer of the bill was sent to the company, and by their direction the defendant accepted it, in this form, "Accepted, 13th June, 1782, per H. Bishop." He was held responsible, the Court considering the addition to his name as merely descriptive, the order to place the sum to the account of the company as a direction how to reimburse himself, and the letter of advice inadmissible to superadd to the terms of the bill, as against the plaintiff, an indorsee (*e*). And a bill directed to W. C. for value received in machinery supplied to the adventurers in Hayter and Holme Moor Mines, and accepted as follows: "Accepted for the companies, payable at the Union Bank, &c., W. C., Purser," was held to create a personal liability (*f*).

The rule of law as to simple contracts in writing, other than bills and notes, is, that parol evidence is admissible to charge unnamed principals, and so it is to give them the

Inadmissibility of parol evidence to discharge him.

(*b*) *Leadbitter v. Farrow*, 5 M. & S. 345; 17 R. R. 345; *Sowerby v. Butcher*, 2 C. & M. 368; 4 Tyr. 320; *Alexander v. Sizer*, L. R., 4 Ex. 105; 37 L. J., Ex. 59. Merely adding the word agent (or executor) is not sufficient; he must expressly decline personal responsibility. Code, s. 26(1). The usual phrase is "*sans recours*."

(*c*) *Leadbitter v. Farrow*, *supra*; *Goupy v. Harden*, 7 Taunt. 160; 2 Marsh. 454; 17 R. R. 478.

(*d*) *Leferre v. Lloyd*, 5 Taunt. 749; 1 Marsh. 318; 15 R. R. 644.

(*e*) *Thomas v. Bishop*, 2 Stra. 955; *Rew v. Pettet*, 1 A. & E. 196; 3 Nev. & M. 456, nom. *Crew v. Pettet*, ante. As to an agent's remedy, see *Huntley v. Sanderson*, 3 Tyr. 469; 1 C. & M. 467; 38 R. R. 663.

(*f*) *Mare v. Charles*, 25 L. J., Q. B. 119; 5 E. & B. 978. See post, as to officers of a public company signing in their own names.

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benefit of the contract (*g*) ; but it is inadmissible for the purpose of *discharging* the agent, who signs as if he were principal in his own name (*h*). And the rule of law is reasonable, for in the two former cases the evidence is consistent with the instrument, for it admits the agent to be entitled or bound ; but in the latter case such evidence would be ⁽ⁱⁿ⁾consistent with the terms of the instrument (*i*).

No one liable
on a bill
unless his
name appears.

Yet it is conceived that the law as to negotiable instruments is different in one respect, to wit, that where the principal's name does not appear, he is not liable on a bill or note as a party to the instrument (*k*).

Where an
agent signs
without
authority.

An agent who makes a contract as agent thereby impliedly undertakes that he has authority, and he and his executors are liable in an action *ex contractu*, if he really had no authority (*l*).

Therefore, if an agent, having no authority so to do, write, without a fraudulent intent, another man's name as acceptor of a bill, that is a fraud in law for which such agent is responsible, even to a subsequent indorsee (*m*) ; but no one can be liable *as acceptor* but the real drawee, unless he be acceptor for honour. And where a man assuming to act as agent is really not so, in consequence of a revocation, by the death of his principal, unknown to

(*g*) As to the cases in which a man who signs himself agent may come forward and sue as principal, see *Bickerton v. Burrell*, 6 M. & S. 383, and *Rayner v. Grote*, 16 L. J., Exch. 82 ; 15 M. & W. 359.

(*h*) As to cases in which an agent has been held personally liable at law, but not in equity, where he described himself as agent, see further, *Wake v. Harrop*, 30 L. J., Exch. 273 ; *Price v. Taylor*, 5 H. & N. 540 ; 29 L. J. 331.

(*i*) *Higgins v. Senior*, 8 M. & W. 834.

(*k*) Code, ss. 23 and 53. See an American case, Story on Agency, 125, n. See also *Pentz v. Stanton*, 10 Wend. 271 ; *Conro v. Port Henry Iron Company*, 12 Barber (New York), 27 ; and the observations of Lord Ellenborough and Mr. J. Holroyd, in *Leadbitter v. Farrow*, 5 M. & S. 341 ; 17 R. R. 345 ; *Bull v. Morrell*, 12 A. & E. 750. But

see *Lindus v. Bradwell*, 5 C. B. 583, where a bill drawn on the principal, accepted by the agent (the wife) in the agent's name, was held binding on the principal as acceptor. See also *Gurney v. Evans*, 27 L. J., Exch. 166 ; 3 H. & N. 122 ; *Edmunds v. Bushell*, 35 L. J., Q. B. 20.

(*l*) *Lewis v. Nicholson*, 18 Q. B. 509 ; *Randall v. Trimen*, 18 C. B. 786 ; *Collen v. Wright*, 7 E. & B. 501 ; 26 L. J., Q. B. 147 ; 8 E. & B. 647 ; 27 L. J., Q. B. 215 ; *Kelner v. Baxter*, 36 L. J., C. P. 94 ; 2 L. R., C. P. 174 ; *Scott v. Lord Ebury*, 36 L. J., C. P. 151 ; 2 L. R. 255 ; *West London Bank v. Kitson*, 12 Q. B. D. 157 ; 53 L. J., Q. B. 345.

(*m*) *Polhill v. Walter*, 3 B. & Ad. 114 ; 37 R. R. 344. If he had signed the *drawer's* name without authority, *quære*, whether he would not have been personally liable *on the bill as drawer*. *Wilson v. Barthrop*, 2 M. & W. 863.

the agent, so that there is no fault in the agent, the agent is not liable (*n*), nor the executors of the deceased principal (*o*).

An agent who has received for his principal money which the principal is bound to refund, is not liable to the owner of the money after he has paid it over to his principal in due course and without notice (*p*).

A safe and proper mode in which an agent may indorse, so as to avoid personal responsibility, is by adding the words *sans recours*, or *without recourse to me* (*q*).

How avoided
in indorse-
ments.

An agent or servant, who joins with his principal or master in the commission of a fraud, is liable to an action, even although the principal be an incorporated company. Thus a director, manager or assistant manager of a joint-stock bank may be personally responsible for a fraudulent report. For the relation of agency or service cannot oblige to the commission of a fraud (*r*).

Liability of
an agent
for fraud.

If a man hold a bill or note as agent for another, and the circumstances be such that the principal cannot recover, the infirmity of the principal's title infects the agent's title, and the agent cannot recover. *M. & Co.*, residing at Middleburgh, remitted to the plaintiff in London, a Bank of England note for 500*l.*, informing him that they should draw upon him for the amount at some future period. The plaintiff presented it for payment, but the bank detained it on the ground that it had been obtained by means of a forged draft from a previous holder. In trover by the plaintiff it was held, that the plaintiff was identified with his principals, and that, as there was no evidence of their having given full value for it, he could not recover (*s*). So where *O. & Co.*, in Paris, being indebted to the plaintiff in London, to the amount of 1,300*l.*, remitted to him a Bank of England note for 500*l.*, and the bank detained it because it had been stolen some time before, it was held in trover by the plaintiff against the bank, that though the plaintiff had a demand on *O. & Co.* for more than the amount of the note at the time when

Rights of an
agent against
third persons.

(*n*) *Smout v. Ilberry*, 10 M. & W. 1.

(*o*) *Blades v. Free*, 9 B. & C. 167; but see the remarks of Brett, L. J., in *Drew v. Nunn*, 4 Q. B. D. at p. 668.

(*p*) *Holland v. Russell*, 32

L. J., Q. B. 297; 4 B. & S. 14.

(*q*) Vide post, Chapter XI.

(*r*) *Cullen v. Thompson*, Dom. Proc. 1863.

(*s*) *Solomons v. The Bank of England*, 13 East, 135; 1 Rose, 99; 12 R. R. 341.

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he received it, yet, as no farther advances had been made, or credit given by him on account of the note, he must be considered as their agent, and prove that his principals, O. & Co., gave full value for it (*t*). From this case, it might seem to follow as a general rule, that wherever a bill or note, payable on demand, is remitted to a creditor in liquidation of an existing debt only, and no fresh credit is given or advances made by the creditor on the faith of the instrument, he may be treated by the parties liable on it as the agent of the debtor from whom he received it. A doctrine which, while it cannot injure the creditor (for if he cannot recover, still he is but where he was before he received the remittance), would, no doubt, tend to prevent gratuitous, fraudulent, or felonious holders of paper from obtaining its value by paying it away to their creditors (*u*). But it is conceived that in general a pre-existing debt due to the transferee of a bill entitles him to all the rights of a holder for value (*x*), whether the bill be payable on demand or not.

Liability of
agent to his
principal.

An agent who fraudulently negotiates or deposits bills is guilty of a misdemeanor, under the 24 & 25 Vict. c. 95, ss. 75 and 76, and is punishable with seven years' penal servitude.

If an agent, employed to present a bill, fails to make a due presentment, or to give due notice of dishonour, he is liable to an action at the suit of his principal (*y*), who may recover nominal damages, though he have sustained no actual loss.

Rights of
principal
against third
persons.

As a principal is bound by his agent's contracts, so he may take advantage of them ; but he is, if undisclosed

(*t*) *De la Chaumette v. The Bank of England*, 9 B. & C. 208.

(*u*) This doctrine was much discussed in the case of *Kinnersley v. Somers*, Exch. M. T. 1832, in relation to Serjeant Onslow's Act, 58 Geo. 3, c. 93. The Court appeared inclined to support the rule deducible from *De la Chaumette v. Bank of England*, but no judgment was given, and the cause was afterwards settled. But see *Perceral v. Framplin*, 3 Dow, 752 ; *Foster v. Pearson*, 1 C., M. & R. 849 ; 5 Tyr. 255. It is to be recollected that a bill or note, payable at a future day, suspends till its maturity the

remedy for the antecedent debt. There may, therefore, in this respect be a difference between an instrument payable on demand, and one payable at a future day. See the Chapter on CONSIDERATION.

(*x*) It has been solemnly so held by the Supreme Court of the United States, *Swift v. Tyson*, 16 Peters, 1 ; and so held in the most recent case on the subject, *Currie v. Misa*, L. R., 10 Ex. 153. See, too, the Chapter on CONSIDERATION, post. Code, s. 27 (b).

(*y*) *Van Wart v. Woolley*, R. & Moo. 4 ; 3 B. & C. 439 ; 5 D. & R. 374 ; 1 M. & M. 520 ; *Van*

at the time of the contract, subject to any defence, partial or complete, on which the defendant could have relied against the agent. A drawer delivered a bill to his agent to be discounted, the agent indorsed the bill as his own to the defendant, a bill broker, who procured it to be discounted, but handed over to the agent only a portion of the proceeds. The drawer, being afterwards obliged to take up the bill, sued the defendant for money had and received to the drawer's use. It was held, that he was entitled to recover, and that a representation by an agent, that the bill was his own, would not preclude the principal from recovering, but only subject him to any defence which the defendant might have set up against the agent (2).

An agent who has authority to take cash in payment has thereby no authority to take bills (a).

Partnership is the relation which subsists between persons carrying on a business in common with a view of profit (b). PARTNERS.

But, to render a man liable to third persons as a partner, it is sufficient if he merely hold himself out to *them* as such, though he really have no interest whatever ; or if he really have an interest, though his name do not appear (c).

In treating of partnership, in its relation to bills of exchange, we shall consider, first, the case of a partnership which is both actual and ostensible ; secondly, the case of a secret or dormant partner ; thirdly, the case of a mere nominal or ostensible partner ; fourthly, the consequences of a dissolution ; and lastly, the case of an occasional partnership. Division of
the subject.

First, as to a partnership both actual and ostensible.

And herein, first, with respect to the rights and liabilities of such partners *inter se*.

PARTNER-
SHIP BOTH
ACTUAL AND
OSTENSIBLE.

Diemen's Bank v. Victoria Bank, L. R., 3 Pr. C. 526 ; 40 L. J., Pr. C. 28.

(2) *Bastable v. Pool*, 1 C. M. & R. 410 ; 5 Tyr. 111.

(a) *Sykes v. Gyles*, 5 M. & W. 645 ; *Williams v. Eans*, 35 L. J., Q. B. 11 ; L. R., 1 Q. B. 352. *Pape v. Westacott*, 1894, 1 Q. B. 272 ; 63 L. J. 222 ; or payment clogged by a condition, *Bank of Scotland v. Dominion Bank, Toronto*, 1891, App. Ca. 592. See post, Chapter on BILL OR NOTE B.B.E.

CONSIDERED AS PAYMENT.

(b) An Act to Declare and Amend the Law of Partnership in the United Kingdom, the 53 & 54 Vict. c. 39, came into force on Jan. 1st, 1891 ; it repeals s. 4 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), and Bovill's Act (28 & 29 Vict. c. 86), though substantially re-enacting them in principle. See ss. 2 and 18.

(c) *Pott v. Eyton*, 3 C. B. 32. See Partnership Act, s. 14.

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Agreement
inter se not to
draw bills.

Cases in which
partners and
others are
both entitled
and liable in
respect of a
bill.

In many deeds and agreements of partnership there is a stipulation, that one partner shall not draw, indorse or accept bills without the consent of his co-partner; the consequence of a violation of this stipulation is, *as between the partners*, to create a right of action at the suit of the injured partner against the partner violating it, and, as we shall presently see, to protect the former against bills improperly drawn, indorsed or accepted, and in the hands of a holder *with notice*.

Where a plaintiff is interested in a bill or note as plaintiff, and yet jointly liable with the defendant, though the objection do not appear on the pleadings, he cannot sue on it. Thus, where M. sued on a note, and the defendants pleaded that the note was made by M., the plaintiff, and others jointly with the defendant, the plea was held a good plea in bar (*d*). So, where a note was made by E. in favour of the firm in which he was a member, *viz.*, C., D. and E., and by them indorsed to A., B. and C., who, as indorsees, brought an action against D., and D. pleaded (not in abatement but in bar) that C., one of the plaintiffs, was also liable as an indorser, together with D., the defendant, the plea was held good (*e*). So where the plaintiff, the holder of shares in a washing company, drew bills on the directors of the company for goods furnished by him, which bills were accepted for the directors by their secretary, in an action by the plaintiff against the directors, it was held that he could not recover. "It may be admitted," says Best, C. J., "that if a partner were to draw on other partners by name, and they were individually to accept, he might recover against them, because by such an acceptance a separate right is acknowledged to exist. But that is not the case here, for the bills are drawn on the directors of the company and accepted for the directors. They are the agents of the company, and accept as agents of the company. The case, therefore, is that of one partner drawing on the whole firm, including himself" (*f*). An agent, and member of a company employed to sell goods for the company, drew in his own name, and payable to his own order, a bill on a purchaser of the goods; he then indorsed it to the actuary of the company, who indorsed it to another member and creditor of the company. It was held that the last indorsee could not sue the drawer on the bill. "Both the parties," say the Court, "were members of the company. If,

(*d*) *Moffat v. Van Millingen*, 2 B. & P. 120; 5 R. R. 554.
B. & P. 124, n.; 5 R. R. 557.

(*f*) *Neale v. Turton*, 4 Bing. 149; 12 Moore, 365; 29 R. R. 531.

(*e*) *Mainwaring v. Newman*, 2

therefore, the plaintiffs could recover on this bill, it would be a recovery by one joint contractor against another, and then the defendants would have a right to call on the plaintiffs for contribution. It is clear, therefore, that no action can be maintained upon the bill" (*g*). But where a married woman, being administratrix, received a sum of money in that character, and lending the same to her husband took for it the joint and several promissory notes of her husband and two other persons, it was held that, after her husband's death, she might maintain an action against the surviving makers (*h*). And where a joint and *several* note was given to two payees, one of them being also one of the makers, it was held, that an action lay at the suit of the two payees against the other maker (*i*). So, where the holder of a bill is also liable upon it, the technical difficulty in the way of an action may be removed by indorsement before the bill is due (*k*).

From these cases the following general principles appear to result.

That in no case can a man sue, where on the face of the record he is both plaintiff and defendant.

Nor where he is, on the contract sued on, both entitled and liable on the face of the instrument (*l*), though that did not appear on the declaration, and though the defendant omitted to plead the non-joinder in abatement.

Nor in certain cases where he is both entitled and liable to contribute, though such liability appear neither on the instrument nor on the record (*m*). But the giving of a bill or note may be an acknowledgment of a separate right and corresponding obligations (*n*).

(*g*) *Teague v. Hubbard*, 8 B. & C. 345; 2 M. & R. 369; Dans. & LL. 118. But the mere holding of scrip only constitutes such an inchoate right of partnership as will not interfere with an action on a note given by the directors. *Fox v. Frith*, 10 M. & W. 131.

(*h*) *Richards v. Richards*, 2 B. & Ad. 447; 36 R. R. 619; see *Rose v. Poulton*, 2 B. & Ad. 822; 36 R. R. 761.

(*i*) *Beecham v. Smith*, E., B. & E. 442.

(*k*) *Morley v. Culterwell*, 7 M. & W. 174; *Steele v. Harmer*, 15 L. J., Exch. 219; 14 M. & W. 831; and 19 L. J., Exch. 34; 4 Exch. 1, in error.

(*l*) In the case of a joint and several note, see *Beecham v. Smith*, supra. Where payee's name accidentally appeared on bill as drawer, a demurrer was overruled in equity. *Druiff v. Lord Parker*, 37 L. J., Chan. 241; L. R., 5 Eq. 131.

(*m*) But see as to Joint Stock Companies, 25 & 26 Vict. c. 89; 30 & 31 Vict. c. 131. The Partnership Act, 1890, c. 39, s. 1, excludes Joint Stock Companies; a corporate body is distinct from the persons forming it. Lindley, L. J., in *Farrar v. Farrars*, 1888, 11 Ch. D., at p. 410.

(*n*) See the observations of Best, C. J., in *Neale v. Turton*, 4

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V.

That the mere technical difficulty, of the same person being both entitled and liable on the face of the instrument, may be removed by death, survivorship, or transfer, provided there be no liability to contribute.

As between
the firm and
the world.

Secondly, as to the rights and liabilities of partners, both actual and ostensible, as between the firm and the world, in respect of bills and notes.

One partner
in trade binds
the other.

The law presumes, that each partner in trade is intrusted by his co-partners with a general authority in all partnership affairs.

Each partner, therefore, by accepting or making, drawing, or indorsing negotiable instruments (*o*) in the name of the firm, and for its usual business, binds the firm (*p*) (unless those dealing with him knew that he had no authority, or were not aware that he was a partner) whether he sign the name of the firm, or sign by procuration, or accept in his own name a bill drawn on the firm (*q*). But it is a strict rule that the name of the firm must be used, otherwise an action cannot be maintained against the firm even where a partner has signed his own name only, and the proceeds were in reality applied to partnership purposes (*r*), unless the name of the signing partner were also the name of the firm (*s*); in which case it was formerly held that the holder might charge either the signing partner or the firm, at his election (*t*). Where one of the partners indorsed

Bing. 149; 12 Moore, 365; 29 R. R. 531; see also *Bedford v. Brutton*, 1 Bing. N. C. 399; *Andrews v. Ellison*, 6 Moore, 199; *Lomas v. Bradshaw*, 19 L. J., C. P. 273; 9 C. B. 620.

(*o*) Code, s. 23. *Harrison v. Jackson*, 7 T. R. 207; 4 R. R. 422; *Pinkney v. Hall*, 1 Salk. 126; 1 Ld. Raym. 175; *Lane v. Williams*, 2 Vern. 277; *Wells v. Masterman*, 2 Esp. 734; *Swan v. Steele*, 7 East, 210; 3 Smith, 199; 8 R. R. 618; *Ridley v. Taylor*, 13 East, 175.

(*p*) 53 & 54 Vict. c. 39, ss. 5 and 6. In *Brown v. Kidger* a bill given to secure a loan already made to a partnership, was held to bind the firm, 28 L. J., Ex. 66; 3 H. & N. 853.

(*q*) *Mason v. Rumsey*, 1 Camp. 384; see *Jenkins v. Morris*, 16 M. & W. 879; *Stephens v. Reynolds*, 5 H. & N. 513.

(*r*) *Siffkin v. Walker*, 2 Camp.

308; 11 R. R. 715; *Ex parte Emly*, 1 Rose, 61; *Emly v. Lye*, 15 East, 7; 13 R. R. 347; *Nicholson v. Ricketts*, 29 L. J., Q. B. 55; *In re Adanson Fibre Company*, L. R., 9 Chan. Ap. 635. The proviso in s. 6 leaves unaffected all general rules of law as to the execution of negotiable instruments.

(*s*) *South Carolina Bank v. Case*, 8 B. & C. 427; 2 Man. & Ry. 459; 32 R. R. 433; *Smith v. Craven*, 1 C. & J. 507; 35 R. R. 764; *Nicholson v. Ricketts*, 29 L. J., Q. B. 55; and see *Ex parte Bolitho*, 1 Buck. 100; *Swan v. Steele*, 7 East, 210; 3 Smith, 192; 8 R. R. 618.

(*t*) *Hall v. Smith*, 1 B. & C. 407; 2 D. & R. 584; *Clerk v. Blackstock*, Holt, 474; *March v. Ward*, Peake, 130; 3 R. R. 667; *Wilks v. Back*, 2 East, 142; 6 R. R. 409; but see now *Ex parte*

the name of the firm on fictitious bills, the firm was held liable (*u*).

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V.

A partner cannot bind his co-partner by the several obligation of a joint and *several* note (*x*), but such a note would not be void as a joint note (*y*), for it seems a partner may bind his co-partner by a joint note (*z*) for partnership purposes, even though in violation of partnership articles, provided the note be in the hands of a holder for value without notice (*a*).

Not by joint and several promissory note.

The firm is not liable where the signing partner varies the style of the firm, unless there be some evidence of assent by the firm to the variation, or unless the name used, though inaccurately, yet substantially describe the firm (*b*). Therefore, where a firm consisted of John Blurton and Charles Habershon, who carried on business under the firm of John Blurton, it was held that the firm was not bound by an *indorsement*, by one partner who had written John Blurton & Co. (*c*). And where defendants never traded under the firm of Dry & Co., but only under the firm of Dry & Everett, it was held that defendant Everett was not bound by a bill accepted by Dry, not for partnership purposes, in the name of Dry & Co. (*d*).

Not varying the style of the firm.

But if a bill be drawn on a firm, and *accepted* by one partner in his own name for partnership purposes, that acceptance will bind the firm (*e*).

Buckley, In re Clarke, 14 M. & W. 469; 15 L. J., Bkcty. 3.

(*u*) *Thicknesse v. Bromilow*, 2 C. & J. 425; 37 R. R. 752.

(*x*) *Perring v. Hone*, 4 Bing. 28; 12 Moore, 125; 2 C. & P. 401.

(*y*) *M'Clae v. Sutherland*, 3 E. & B. 36.

(*z*) *Cross v. Cheshire*, 21 L. J., Exch. 3.

(*a*) See the numerous American authorities on this subject, Byles on Bills, 6th American edition, p. 72; Code, s. 38.

(*b*) *Williamson v. Johnson*, 1 B. & C. 146; 2 D. & R. 281; 25 R. R. 336; *Faith v. Richmond*, 11 A. & E. 339; 3 Per. & D. 187; *Forbes v. Marshall*, 11 Exch. 166; *Stephens v. Reynolds*, 29 L. J., Exch. 278; 5 H. & N. 513.

(*c*) *Kirk v. Blurton*, 9 M. & W.

284; but see *M'Clae v. Sutherland*, 3 E. & B. 36; and *Odell v. Cormack*, 19 Q. B. D. 223.

(*d*) *Sheppard v. Dry*, Norwich, 1840, cor. Parke, B., affirmed in Q. B. *Quære*, whether a partner may not bind his co-partner by signing the true names of the partners, though such names be not the style of the firm. *Norton v. Seymour*, 3 C. B. 792; *M'Clae v. Sutherland*, supra. One partner has no power to bind firm by opening an account on its behalf in his own name. *Alliance Bank v. Kearsley*, L. R., 6 C. P. 433; 40 L. J. 249.

(*e*) *Mason v. Rumsey*, 1 Camp. 384. An agent not a partner and not having authority cannot accept a bill drawn on the firm in the names of himself and the sole remaining partner. *Odell v. Cormack*, 19 Q. B. D. 223.

CHAPTER
V.Farming and
mining part-
nerships.Partnerships
not in trade.Creditors
carrying on
business under
a deed of
arrangement.Consequences
of partner ex-
ceeding his
common law
authority.

It has been held, that as the drawing or accepting of bills is not in general necessary in a farming or mining concern, bills accepted by one of the partners in such a concern without express authority, do not bind the firm (*f*).

And partners not in trade cannot bind each other by bills. Therefore one attorney, who is partner with another, has not from that relation alone power to bind his co-partner by a bill or note (*g*). No more have partners carrying on business as brokers by getting orders on commission and dividing the expenses (*h*).

Creditors who are empowered by a deed of arrangement, made between themselves and their debtor, to carry on the trade to satisfy their debts *out of the profits*, and to pay over the residue to the debtor, are not partners at all, and therefore are not liable on bills accepted by them in the style of their debtor's firm (*i*). For a creditor, who stipulates that he will be paid out of the profits only, gains nothing beyond what he already had as a creditor; on the contrary, he only abandons some other sources from which he might have obtained satisfaction. As a creditor he could have satisfied himself out of the whole property of his debtor, including profits.

Even if a partner exceed the authority conferred by the common law and pledge the partnership credit on a negotiable security for his own private advantage, his co-partners are liable to a holder for value without notice.

(*f*) *Greenslade v. Dower*, 7 B. & C. 635; 1 M. & R. 640; 31 R. R. 272; *Dickinson v. Valpy*, 10 B. & C. 128; 5 M. & R. 126; 34 R. R. 348; *Russell v. Pollett*, executors, 1840. But see *Brown v. Kidger*, 3 H. & N. 853. Unless it be the ordinary and known course of such mining concerns as the defendant's to draw and accept bills.

(*g*) *Hedley v. Bainbridge*, 3 Q. B. 316; *Forster v. Mackworth*, L. R., 2 Ex. 163; 36 L. J., Ex. 94, which was the case of a post-dated cheque. In America it has been held that the same rule applies to partners in the practice of physic, and to partners in a tavern. See the authorities, Byles on Bills, 6th American edition, p. 75.

(*h*) *Yates v. Dalton*, 28 L. J., Exch. 69.

(*i*) *Cox v. Hickman*, 8 House of Lords' Cases, 268; 9 C. B., N. S. 47; 30 L. J., C. P. 125. This case has been supposed to shake the authority of *Waugh v. Carrer*. See *Bullen v. Sharpe*, L. R., 1 C. P. 86. Executors of a deceased partner receiving a share of the profits in accordance with the articles of partnership, were not on that account merely held to be partners. *Holme v. Hammond*, L. R., 7 Ex. 218; 41 L. J. 157. Participation in profits is strong, but not conclusive evidence of partnership, 53 & 54 Vict. c. 39, s. 2. *Pooley v. Driver*, L. R., 5 Ch. D. 459; *Ex parte Tennant*, 6 Ch. D. 303; *Mollwo & Co. v. Court of Wards*, L. R., 4 P. C. 419. Written evidence may be required to bring a case within the above statute. *Syers*

And if there be a good defence against one of several partners or co-plaintiffs suing on a bill, note, or other joint contract, it is a good defence against all (*k*); although the co-partner or co-plaintiff to whose right to sue the objection applies have been guilty of a fraud on his co-partners and companions, and they have been innocent of it. "Are they not bound by his acts," says Lord Ellenborough, "when they are to recover by his strength?" (*l*). The defrauded partner's remedy (at least during his companion's lifetime) must have been in equity (*m*). Thus, if one partner assume to relieve an acceptor of his responsibility, the firm lose their action. Two bills had been drawn by a partnership, and accepted, and it was proved that the value received for the acceptance had been employed in taking up other acceptances for the accommodation of the partnership; the promise of one partner, in fraud of his co-partners, to provide for the acceptances, was held to be a sufficient defence to an action by them against the acceptor (*n*).

So, where D. drew a bill in his own name, and gave the acceptor a memorandum, in writing, that he would provide for it when due, having indorsed it to the firm of A., B., C. and D., it was held that the firm were bound by his acts, and could not recover against the acceptor (*o*).

But, if the party taking a bill or note of the firm knew, at the time, that it was given without the consent of the other partners, *he* cannot charge them (*p*). And the taking a joint security for a separate debt raises a presumption that the creditor who took it knew that it was given without the concurrence of the other partners (*q*). If there existed

Where there
is notice.

v. Syers, L. R., 1 App. Ca. 174. In *Ex parte Delhase*, 7 Ch. D. 511, the distinction was drawn between a loan to the business and a loan to the partners personally.

(*k*) *Astley v. Johnson*, 5 H. & N. 137; *Brandon v. Scott*, 7 E. & B. 234.

(*l*) *Richmond v. Heapy*, 1 Stark. 204.

(*m*) See *Jones v. Yates*, 9 B. & C. 539; 33 R. R. 255; *Gordon v. Ellis*, 7 M. & G. 607; 2 C. B. 821.

(*n*) *Richmond v. Heapy*, 1 Stark. 202.

(*o*) *Sparrow v. Chisman*, 9 B. & C. 241; 4 M. & R. 206; 32 R. R. 664.

(*p*) Code, s. 29; 53 & 54 Vict. c. 39, s. 5. See the 6th American

edition of Byles on Bills, p. 77. See, too, case of *Darlington Bank*, 34 L. J., Chanc. 10; *Heilbut v. Nevill*, L. R., 5 C. P. 478; 39 L. J., C. P. 245; *Hogarth v. Latham*, L. R., 3 Q. B. D. 643.

(*q*) *Richmond v. Heapy*, 1 Stark. 202; *Arden v. Sharpe*, 2 Esp. 524; 5 R. R. 748; *Barber v. Backhouse*, Peake, 61; and see *Wallace v. Kelsall*, 7 M. & W. 264; *Jones v. Yates*, 9 B. & C. 532; 33 R. R. 255; *Jacaud v. French*, 12 East, 317; 11 R. R. 390; *Gordon v. Ellis*, 7 M. & G. 607; *Larson v. Lane*, M. T. 1862; 32 L. J., N. S., C. P. 32; 13 C. B., N. S. 278, established this view of the law. But when the bill is in the hands of a transferee for value,

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fraud and collusion between the partner and his creditor, the bill is void in the hands of the fraudulent holder, not only against the partnership, but against other parties to the bill (*r*). But securities which may be unavailing against the firm, when in the hands of the party privy to the transaction, will nevertheless bind them when in the hands of an innocent indorsee for value (*s*). But in such a case it lies on the plaintiff to show that he gave value in good faith (*t*).

Effect of
partnership
articles
against draw-
ing bills.

Articles of agreement between the partners, that no one partner shall draw, accept or negotiate bills of exchange, will not protect the firm against bills drawn, accepted or indorsed in violation of the agreement, if the holder had at the time of taking the bill (*t*), no notice of the stipulation, and can show that he gave value. But if notice of such agreement can be brought home to the holder, or if, in the absence of such agreement between the partners, the other partners have given him notice that they will not be responsible for bills circulated by their co-partner, the firm cannot be charged, though the bill was given in the course of partnership transactions (*u*).

Pleading and
evidence.

The proper mode of raising the defence of unauthorized and fraudulent acceptance by one of several partners and notice to the plaintiff, was by a traverse of the acceptance (*x*).

If the defendants show that the bill was circulated in violation of partnership articles, they will thereby put the plaintiff to prove that he or some one under whom he claims gave value in good faith for it, subsequently to the fraud (*y*). But it has been held by the Court of Queen's Bench, after conference with the Judges of the other Courts, that in order to maintain the action, where it appears that one partner has accepted in fraud of his co-partners, and *where issue is taken on the acceptance*, it is not necessary for the

the *onus* of proof may be shifted. Where the acceptance of the firm was given by one partner for an amount including a joint and separate debt, a common count was inserted for the consideration of the joint debt; *Ellston v. Deacon*, L. R., 2 C. P. 21.

(*r*) *Ex parte Bonbonus*, 8 Ves. 540; *Wells v. Masterman*, 2 Esp. 731; *Green v. Deakin*, 2 Stark. 347; *Ex parte Gouldney*, 2 G. & J. 118; 8 L. J., Bkcty. 1.

(*s*) *Ridley v. Taylor*, 13 East, 175.

(*t*) *Hogg v. Skene*, 34 L. J., C. P. 153. Code, s. 30 (2).

(*u*) *Galway v. Mathew*, 10 East, 264; 1 Camp. 403; 10 R. R. 289.

(*x*) *Jones v. Corbett*, 2 Q. B. 828; *Grout v. Enthoren*, 1 Exch. 382. See now Ord. XIX. rr. 22 and 23.

(*y*) *Grant v. Hawkes*, Chitty, 42; *Hogg v. Skene*, 34 L. J., C. P. 153; Code, s. 30 (2).

plaintiff to prove that he gave value, but the defendants must affect the plaintiff with notice of the fraud (z), or otherwise impeach his title.

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V.

If a man be at one and the same time a partner in two distinct firms, but each firm use the same style, and he draw a bill in the common name of both firms, it has been held, that an indorsee may charge either firm at his election (a).

When a man is partner in two firms of the same name.

But where the name of the firm is the same as the name of the individual, and the bill is drawn by the individual for his separate benefit, perhaps the firm is not pledged, but unless the individual carry on a separate business, the presumption seems to be against the firm (b).

If a new partner be introduced into a firm, an acceptance by the old partners for an old debt in the name of the new firm will not, in the hands of the party taking it and cognizant of the facts, bind the new partner (c).

New partner.

The taking security from one of several partners, joint makers of a note, or acceptors of a bill, will, in general, discharge the other co-partners (d). But where one of three partners, after a dissolution of partnership, undertook to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills, it was held that, the separate notes having proved unproductive, he might still resort to his remedy against the other partners : and that the taking under these circumstances the separate notes, and even

Taking fresh security.

(s) *Musgrave v. Drake*, 5 Q. B. 185, in which case *Grant v. Hawkes* was not cited. *Musgrave v. Drake* was not followed in *Hogg v. Skene* (34 L. J., C. P. 153), which case seems more in accordance with the Code, s. 30 (2). Now, by Ord. XIX. rr. 15 to 23, the defendant apparently should plead that the acceptance was obtained by fraud, and that the plaintiff had notice thereof, or gave no value, as the case may be.

(a) *Baker v. Charlton*, Peake's N. P. C. 80 ; *M'Nair v. Fleming*, Mont. 32 ; *Swan v. Steele*, 7 East, 210 ; 3 Smith, 199 ; 8 R. R. 618 ; see, however, *Ex parte Buckley*,

In re Clarke, 14 M. & W. 469 ; 15 L. J., Bkcty. 3. Compare *Yorkshire Bank v. Beatson*, *infra*.

(b) *Yorkshire Bank v. Beatson*, 5 C. P. D. 109. In America *prima facie* the firms are not bound. Byles on Bills, 6th Amer. ed. p. 80. See, too, *Ex parte Bolitho*, 1 Buck. 100 ; *Wintle v. Crowther*, 1 C. & J. 316 ; 1 Tyr. 210 ; 35 R. R. 728 ; *Furze v. Sharwood*, 11 L. J., Q. B. 119 ; and *Ex parte Buckley*, *supra*.

(c) *Shirreff v. Wilks*, 1 East, 48 ; 5 R. R. 509.

(d) *Evans v. Drummond*, 4 Esp. 89 ; *Thompson v. Perceval*, 5 B. & Ad. 925 ; 3 N. & M. 667.

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Ratification.

afterwards renewing them several times successively, did not amount to satisfaction of the joint debt (*e*).

DORMANT
OR SECRET
PARTNER.

His liabilities
and rights.

Where the circumstances were such that the partner had no power to bind the firm by a bill, subsequent recognition of the act will be equivalent to previous authority (*f*).

Secondly, as to the case of a secret or dormant partner. A dormant partner, whose name does not appear, is bound by bills drawn, accepted, or indorsed by his co-partners *in the name of the firm*, and not only when the bills are negotiated for the benefit of the firm, but when they are given by one of the partners for his own private debt, provided the holder were not aware of the circumstance (*g*): for credit is given to the firm generally, of whomsoever it may consist.

But where a man agreed to become a dormant partner in a firm, and the secret partnership was to commence from a time past, and after the stipulated time for the commencement of the partnership, but before the actual agreement, the members of the firm had negotiated bills in the name of the firm, and applied the proceeds to their own benefit, the incoming partner, though a partner by relation at the time the bills were negotiated, was held not liable. He could not be charged on the ground of interest, for he derived no benefit from the bills, nor on the ground of credit having been given to him, for he was no member of the firm at the time; nor on the ground of having ratified the acts of his co-partners, for there can be no ratification where there was no assumed authority (*h*).

Joinder in
actions.

A dormant partner may join and sue on a bill (*i*), or the ostensible partner may sue alone (*k*). But the non-joinder of a dormant partner as defendant could not be pleaded in abatement (*l*).

(*e*) *Bedford v. Deakin*, 2 B. & Ald. 210; 2 Stark. 178.

(*f*) Code, s. 24. *Duncan v. Lowndes*, 3 Camp. 478; 14 R. R. 815; and see *Vere v. Ashby*, 10 B. & C. 288; and *Wilson v. Tumman*, 6 M. & G. 236. As to banking partnerships, see post, *Corporations and Companies*.

(*g*) *Vere v. Ashby*, 10 B. & C. 288; 34 R. R. 408; *Lloyd v. Ashby*, 2 B. & Ad. 23; 36 R. R. 454; *Swan v. Steele*, 7 East, 210; 3 Smith, 199; 8 R. R. 618.

(*h*) *Vere v. Ashby*, 10 B. & C. 288; 34 R. R. 408; see *Battley v. Lewis*, 1 M. & G. 155; 1 Scott,

N. R. 143, and *Wilson v. Tumman*, 6 M. & G. 236.

(*i*) *Cothay v. Fennell*, 10 B. & C. 671; 34 R. R. 541; *Skinner v. Stocks*, 4 B. & Ald. 437; 23 R. R. 337.

(*k*) *Lereck v. Shafto*, 2 Esp. 468; *Lloyd v. Archbowl*, 2 Taunt. 324; 11 R. R. 595; and see *Mawman v. Gillett*, 2 Taunt. 325, n.; 11 R. R. 597; *Kell v. Nainby*, 10 B. & C. 20.

(*l*) *De Mautort v. Saunders*, 1 B. & Ad. 398. The share of a dormant partner did not pass to the trustee in bankruptcy; *Reynolds v. Bowley*, L. R., 2 Q. B.

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V.

NOMINAL
PARTNER.

Thirdly, as to a mere nominal or ostensible partner. Though a man really have no interest in a firm, yet if he suffer himself to be held out to the world as a member of it, he hereby authorizes those *to whom he has been so held out* to treat him as a contracting party; for as they cannot know whether his interest be merely apparent or real, they would be injured and defrauded, if they could not charge him as a partner (*m*).

DISSOLUTION.

Fourthly, as to the consequences of a dissolution of partnership; which (in the absence of a special agreement) is brought about by the death or bankruptcy of any partner, as well as by mutual consent. After a dissolution, the ex-partners have no longer power to bind each other by bills or notes to persons aware of the dissolution (*n*). But notwithstanding a valid dissolution of an ostensible partnership by an agreement between the partners, still as between the firm and the world the authority of the ex-partners to bind each other by bills, notes or other contracts, within the scope of the former partnership, continues till the dissolution be duly notified.

Such notice may be either express or implied.

Express
notice of it.

The only safe mode of proceeding is to give express notice to all who have hitherto dealt with the firm, and to advertise the dissolution or change of partnership; in the *London Gazette* for a firm, whose principal place of business is in England or Wales; and in the *Edinburgh* and *Dublin Gazettes* respectively for Scotland and Ireland; such advertisement being notice to all not previously customers of the firm.

The ex-partners are not safe against any of the persons whose names are on a bill of exchange, unless notice be given to each. After a dissolution, one of the ex-partners accepted a bill in the name of the firm; the payee had no notice of the dissolution, but the indorsee had. It was

474; 36 L. J. 247. But since Bovill's Act, 28 & 29 Vict. c. 86 (now repealed), a dormant partner is postponed to other creditors, Partnership Act, 1890, ss. 2 and 3. Pleas in abatement are abolished by Ord. XVI. r. 11.

(*m*) 53 & 54 Vict. c. 39, s. 14. Where the contract is made with a firm in which there is a nominal partner, the real partner may sue alone without joining the nominal

partner as co-plaintiff. *Kell v. Nuinby*, 10 B. & C. 20. To make a man liable as a nominal partner he must have been held out as such *to the plaintiff*. Per Parke, J., *Dickinson v. Valpy*, 10 B. & C. 141; 5 M. & Ry. 126; 34 R. R. 348; *Gurney v. Evans*, 3 H. & N. 122.

(*n*) *Heath v. Sansom*, 4 B. & Ad. 172; 1 Nev. & M. 104; 38 R. R. 237. 53 & 54 Vict. c. 39, s. 38.

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held, that though the indorsee had had notice of the dissolution, he could recover on the bill against the firm, because the payee had had no notice, and the indorsee had a right to stand on the payee's title (*o*).

Implied or indirect notice.

When bankers had dissolved partnership, a corresponding change in their printed cheque was, as against a person who was an old customer, but had drawn a cheque in the new form, held sufficient notice of the dissolution. Lord Ellenborough—"I think the change was sufficiently notified by the change in the cheque. It is the habit of banking houses to intimate in this manner that a partner has been introduced or has retired" (*p*).

Where a bill has been accepted by an ex-partner in the name of the firm, in favour of an attorney who had a year before prepared a draft of a deed of dissolution between the partners, which deed it did not appear had ever been executed, Lord Ellenborough held, that if the attorney would insist on the continuance of the partnership, it lay on him to show that the intention to dissolve had been abandoned (*q*).

A notice of the dissolution in the *Gazette* is not sufficient to exempt a retiring partner from responsibility to a former dealer with the firm, unless it be shown that such dealer was in the habit of reading the *Gazette* (*r*). But a mere notice in the *Gazette* is now, as against a man who had had no previous dealings with the firm, evidence of notice of dissolution (*s*). An advertisement of a dissolution in a newspaper was not even admissible, without proof that the party sought to be affected with such notice took in the newspaper (*t*). But in that case it was not necessary

(*o*) *Booth v. Quin*, 7 Price, 193.

(*p*) *Barfoot v. Goodhall*, 3 Camp. 147; and see *Vise v. Fleming*, 1 Younge & J. 227.

(*q*) *Paterson v. Zachariah*, 1 Stark. 71.

(*r*) *Godfrey v. Turnbull*, 1 Esp. 371; *Leeson v. Holt*, 1 Stark. 186; 18 R. R. 758; *Graham v. Hope*, Peake, 154; 3 R. R. 671; *Gorham v. Thompson*, ib. 42; 3 R. R. 650; *Rex v. Holt*, 5 T. R. 443; *Williams v. Keats*, 2 Stark. 290; 19 R. R. 723; see also *Ex parte Usburne*, 1 Glyn & Jam. 358. A notice of dissolution in the *Gazette* may be given in evidence without a stamp. *Jenkins v. Blizard*, 1 Stark. 418; 18 R. R. 792.

(*s*) 53 & 54 Vict. c. 39, s. 36. *Godfrey v. Turnbull*, 1 Esp. 671; *Newsome v. Coles*, 2 Camp. 617; 12 R. R. 756. It has been established in America, that notice in the *Gazette* or in any other public and proper manner is sufficient, as against persons who had no previous dealings with the firm. See the authorities, Byles on Bills, 6th American edition, p. 84; 3 Kent's Com. 66; and see *Furrar v. Deflinne*, 1 C. & K. 580.

(*t*) *Leeson v. Holt*, 1 Stark. 186; 18 R. R. 758; *Boydell v. Drummond*, 11 East, 142; 10 R. R. 450; *Norwich Navigation Company v. Theobald*, 1 M. & M. 153; *Jenkins v. Blizard*, 1 Stark. 420; 18 R. R. 792; *Horil v. Browning*,

that the dissolution should have been advertised in the *Gazette* (u).

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A secret partner is not liable after a dissolution, though without notice, on a bill or note given by the continuing partners in the name of the firm ; for the contract was not made on his credit, nor had he any interest in it (x).

Notice of retirement of secret partner.

Where the dissolution is by death, notice is not necessary to protect the estate of the deceased (y).

Notice of dissolution.

After a dissolution, and due notice thereof, the ex-partners become tenants in common of the partnership effects, and their authority as mutual agents is at an end, except for pending transactions and the winding-up.

Effect of dissolution.

One ex-partner cannot, therefore, indorse in the name of the firm a bill which belonged to the firm, but all must join (z), though the ex-partner indorsing have authority to settle the partnership affairs. "I even doubt much," says Lord Kenyon, "if an indorsement were actually made on a bill or note before the dissolution, but the bill or note was not sent into the world till afterwards, whether such indorsement would be valid" (a).

But a statement by the ex-partner that he had left the assets and securities in the hands of the continuing partner, and that he had no objection to his using the partnership name, is evidence from which a jury may infer an authority to indorse (b). An authority to indorse may be inferred, though the written agreement of dissolution contain no such authority. But an authority to the continuing partner "to wind up the business" will not enable him to indorse the securities of the late firm (b). Both ex-partners ought therefore to indorse, for that is the proper mode of indorsing by persons who are not partners (c). But if the outgoing partner suffer his name to appear as partner, new customers, notwithstanding notice in the *Gazette*, may charge him.

When authority to indorse after dissolution may be inferred.

7 East, 161 ; *Rowley v. Horne*, 3 Bing. 2 ; 10 Mo. 247 ; 28 R. R. 551.

(u) *Booth v. Quin*, 7 Price, 193.

(x) *Erans v. Drummond*, 4 Esp. 89 ; *Newmarch v. Clay*, 14 East, 239 ; *Heath v. Sansom*, 4 B. & Ad. 172 ; 1 N. & M. 104 ; 38 R. R. 237.

(y) *Vulliamy v. Noble*, 3 Mer. 619 ; 17 R. R. 143. 53 & 54 Vict. c. 39, s. 36 (3).

(z) *Abel v. Sutton*, 3 Esp. 108 ; 6 R. R. 818 ; *Kilgour v. Finlayson*, 1 H. Bl. 155 ; but see *Lewis v. Reilly*, 1 Q. B. 349 ; and 53 & 54 Vict. c. 39, s. 38.

(a) *Abel v. Sutton*, 3 Esp. 108 ; 6 R. R. 818.

(b) *Smith v. Winter*, 4 M. & W. 454.

(c) *Currick v. Vickery*, 2 Doug. 653, n.

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K. and A. dissolved partnership, and advertised the dissolution in the *Gazette*. K. accepted a bill in the name of the firm, ante-dating it, so that it appeared to have been drawn before the dissolution. This bill came into the hands of the indorsee, for value, without actual notice of the dissolution. A. had allowed his name to remain over the door of a hatter's shop in the Poultry, where the business had been carried on. Lord Ellenborough held A. liable on the bill, observing, that he had imprudently suffered notice to be given of the continuance of the partnership by permitting his name to remain over the door (*d*).

Dissolution
by death.

If one partner die, being liable or entitled on a bill or note, the legal right or liability survives, but the personal representatives of the deceased were entitled or liable in equity (*e*).

By bank-
ruptcy.

Bankruptcy being a dissolution, an indorsement by one of the several partners, after a secret act of bankruptcy, is invalid (*f*). But it has been also held, that, as the ex-partners still hold themselves out to the world as partners, they are liable to third persons (*g*).

OCCASIONAL
PARTNER-
SHIPS.

Lastly, as to an occasional partnership.

A partnership may be either a general partnership, or a particular one for a single transaction.

An interest in the profits of a single transaction makes a man a partner, and liable to third parties (*h*).

A joint security given by one partner, in a mere occasional partnership for a private debt, does not charge his co-partner, though in the hands of a *bonâ fide* holder for value (*i*).

EXECUTORS
AND ADMIN-
ISTRATORS.

The executor of a deceased party to a bill or note has, in general, the same rights and liabilities as his testator. "The

(*d*) *Williams v. Keats*, 2 Stark. 290; 19 R. R. 723; and see *Newsome v. Coles*, 2 Camp. 617; 12 R. R. 756; *Stables v. Ely*, 1 C. & P. 614.

(*e*) *Lane v. Williams*, 2 Vern. 277; *Bishop v. Church*, 3 Ves. sen. 100, 371; *Vulliamy v. Noble*, 3 Mer. 614; 17 R. R. 143; *Heath v. Perceral*, 1 P. Wms. 682; 1 Stra. 403. But the right of survivorship, in partnership chattels

of a trading firm, does not exist. *Buckley v. Barber*, 6 Exch. 164. Partnership Act, ss. 5, 9 and 33. *Buckley v. Barber* would now be governed by s. 23.

(*f*) *Thomason v. Frere*, 10 East, 418; 10 R. R. 341.

(*g*) *Lacy v. Woolcot*, 2 D. & R. 458.

(*h*) *Heyhoe v. Burge*, 19 L. J., C. P. 243; 9 C. B. 431.

(*i*) *Williams v. Thomas*, 6 Esp. 18.

executors of every person," says Lord Macclesfield, "are implied in himself and bound without naming" (*k*).

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Therefore, if a bill be indorsed to a man who is dead, by a person ignorant of his death, that will be an indorsement to the personal representative of the deceased (*l*). On the death of the holder of a bill or note, his executors or administrators may indorse (*m*); and an indorsement by the executors or administrators is for all purposes as effectual as an indorsement by the deceased (*n*).

Their rights
and duties.

Presentment (*o*), notice of dishonour and payment should be made by and to the executor or administrator, in the same manner as by or to the deceased.

If the holder be dead and the executor have not yet proved the will, still it seems the executor is bound to present the bill when presentable (*p*); for his title to his testator's property is derived exclusively from the will, and vests in him from the moment of the testator's death (*q*). But as the title of an administrator is derived wholly from the Court of Probate, and he has none till the letters of administration are granted, he would probably be excused by impossibility.

A probate, being a judicial act of the Court of Probate, is conclusive as to the validity and contents of the will, and the title of the executor; and, as long as it remains unrepealed, cannot be impeached in the other Courts. Therefore, a voluntary payment to an executor who has obtained probate of a forged will, is a discharge to the debtor, notwithstanding that the probate is afterwards declared null (*r*).

Effect of
probate.

Bills of exchange are to be paid in the course of administration as simple contract debts. They were before the General Probate Act, 20 & 21 Vict. c. 77, *bona notabilia*; not, as in a case of specialty, where the instrument might happen to be, but where the debtor resided at the time of the creditor's death (*s*).

(*k*) *Hyde v. Skinner*, 2 P. Wms. 196. See *Williams v. Burrell*, 1 C. B. 402.

(*l*) *Murray v. East India Company*, 5 B. & Ald. 204; 24 R. R. 325.

(*m*) *Rawlinson v. Stone*, 3 Wils. 1; 3 Stra. 1260.

(*n*) *Watkins v. Maule*, 2 Jac. & Walker, 243.

(*o*) *Molloy*, 2, 10.

(*p*) *Marius*, 135; *Molloy*, 2, 10; *Poth.* 146.

(*q*) *Com. Dig. Adminis. B. 10*; *Woolley v. Clark*, 5 B. & Ald. 744; 1 D. & Ry. 409; 24 R. R. 546.

(*r*) *Allen v. Dundas*, 3 T. R. 125; 1 R. R. 666.

(*s*) *Yeomans v. Bradshaw*, *Carthew*, 373; 3 Salk. 70.

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Priority of
specialty over
simple con-
tract debts
abolished.

Debtor made
executor.

By 32 & 33 Vict. c. 46, the priority of specialty over simple contract debts in the case of persons dying since January 1st, 1870, is abolished.

It was a general rule of law, that, if a creditor constituted his debtor executor, the debt was released and extinguished, for the same hand being at once to receive and to pay, the action was suspended; and a personal action once suspended by the act of the parties is gone for ever; but it was otherwise in equity in the absence of circumstances showing an intention to release the debt, and the equitable doctrine now prevails (*t*). Hence it followed that if the holder of a bill appointed the acceptor his executor the acceptor was discharged at law, and all the other parties also, for a release to the principal discharged the sureties. So it has been decided, that if the payee of a note, payable on demand, constituted the maker of the note his executor, the maker was discharged, not only from his liability to the estate of the testator, but also from his liability *as maker* to an indorsee to whom the executor assigned it after the testator's death (*u*). But it is conceived that if the note, at the time of the testator's death, had been in the hands of an indorsee, the maker would still have been liable as maker to the indorsee, and that if the note had been payable at a future time, and indorsed by the executor after the testator's death, but before the note was due, the maker would have been

(*t*) Year Book, 20 Edw. 4, 17; 21 Edw. 4, 36; Dyer, 140; *Nedham's Case*, 4 Coke, 409, *a*; *Fryer v. Gildridge*, Hobart, 10; *Sturleyn v. Albany*, Cro. Eliz. 150; *Dorchester v. Webb*, Cro. Car. 372; *Wankford v. Wankford*, 1 Salk. 299; *Cheetham v. Ward*, 1 Bos. & Pul. 630; 4 R. R. 741; *Freakly v. Fox*, 9 B. & C. 130; 32 R. R. 605. As to the equitable doctrine, see *Strong v. Bird*, L. R., 18 Eq. 315. But for the prevalence given to the rules of equity under the Judicature Act, some provision correcting the old rule at law might have been necessary in the Code. Sect. 61 does indeed expressly deal with the case of the acceptor (or maker), but does not include the other parties to a bill, as drawer or indorsers, and only treats of a transfer to him in his own right at or after maturity, whereas the

former rule of law was general. It seems, therefore, that the framers of the Code regarded the old rule of law as already overridden by the doctrine of the Chancery side, and that s. 61 was not directed against it, or the other parties to a bill would have been included in the section, but against the re-issue of an instrument coming after maturity into the hands of the party ultimately liable in his own right, and not merely as assignee or trustee or executor, for then the instrument is *functus officio* and the stamp exhausted.

(*u*) *Freakly v. Fox*, 9 B. & C. 130; 4 Man. & R. 18; 32 R. R. 605. See also *Harmer v. Steele*, 4 Exch. 1. Such a release in law might formerly have been made by an infant testator, at the age of seventeen years complete. Co. Litt. 264, *b*.

liable as maker to an indorsee without notice ; for since a premature secret payment by the maker would not have protected him (*x*), no more, it should seem, would a premature secret release to him (*y*).

If one of several joint debtors were appointed executor, it was a release to all (*z*), and though they were liable severally as well as jointly, for judgment and execution against one would have been a discharge to all (*a*) ; and an express release to one might have been pleaded in bar by all (*b*). The debt was also released where one only of several executors was indebted (*c*), and though the executor die without having either proved the will or administered (*d*).

But if a sole executor refused to act, the debt was not discharged (*e*). If the creditor made the executor of the debtor his executor, that was no discharge (*f*).

Though the appointment of a debtor to be executor released him from liability to the first or any subsequent representatives of the testator, yet the debt is still assets in his hands in favour both of creditors and legatees (*g*).

Debt is assets.

The taking out letters of administration by a debtor to his creditor is merely a suspension of the legal remedies as between the parties : but being the act of the law, and not the act of the intestate, it is no extinguishment of the debt, for the action will revive when the affairs of the intestate and of the administrator are no longer in the hands of the same person (*h*).

Debtor becoming administrator.

If a note or a bill be made or indorsed to an executor as executor, he may sue on it in his representative capacity,

When executors may sue as such.

(*x*) *Burbridge v. Manners*, 3 Camp. 193 ; 13 R. R. 786.

(*y*) *Dod v. Edwards*, 2 C. & P. 602.

(*z*) Wentworth, Off. Exors. c. 2 ; Com. Dig. Admin. B. 5.

(*a*) Bro. Ab. Exors. p. 118 ; *Fryer v. Gildridge*, Hob. 10 ; *Cheetham v. Ward*, 1 Bos. & Pul. 630 ; 4 R. R. 741 ; *Wankford v. Wankford*, 1 Salk. 299.

(*b*) 2 Rol. Abr. 412 ; *Clayton v. Kynaston*, 2 Salk. 574 ; 2 Saund. 47, *t*.

(*c*) Bro. Exors. pl. 114 ; Went. Off. Exors. c. 2, pp. 74, 75, 14th ed. ; Com. Dig. Adm. B. 5 ; *Wankford v. Wankford*, 1 Salk. 299, by Powell, J. ; *Cheetham v. Ward*, 1 Bos. & Pul. 630 ; 4 R. R. 741.

(*d*) *Wankford v. Wankford*, 1 B.B.E.

Salk. 299 ; Went. c. 2 ; Com. Dig. Adm. B. 5.

(*e*) *Wankford v. Wankford*, 1 Salk. 299 ; but see *Abram v. Cunningham*, 1 Vent. 303 ; Butler's Co. Litt. 264, *b*.

(*f*) Bac. Abr. Exors. A. 10 ; *Dorchester v. Webb*, Cro. Car. 372 ; W. Jones, 345 ; 1 Salk. 305 ; *Alston v. Andrew*, Hutton, 128.

(*g*) Bac. Abr. Exors. A. 10 ; *Brown v. Selwyn*, Cases temp. Talbot, 241, 242 ; *Holiday v. Boas*, 1 Rol. Abr. 920 ; *Woodward v. Lord Dacre*, Plowd. 186 ; *Dorchester v. Webb*, Cro. Car. 373 ; Shep. Touchstone, 497-8 ; *Wankford v. Wankford*, 1 Salk. 299. See Wentworth, Off. Exors. c. 2.

(*h*) *Sir John Nedham's case*, 4 Coke, 409 ; *Wankford v. Wank-*

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and join claims on promises to the testator (*i*): and a note given to the administrator for a debt due to the testator passes to the administrator *de bonis non* (*k*); though a payment of the amount of the instrument to the administrator of the executor would be good in equity, and now at law (*l*). After considerable conflict, the rule of law was firmly established, that whenever the money sought to be recovered was assets, the executor might sue, as executor, on a contract made with himself in his representative capacity, and join counts on promises to his testator (*m*). Thus to counts on a bill or note given to his testator, he might join a count for money paid by himself as executor (*n*); a count for goods sold by himself (*o*), for works done by himself (*p*); a count on an account stated with the plaintiff as executor, of monies due to the testator (*q*); or a count on an account stated with the plaintiff as executor, of monies due to himself as executor (*r*).

Joinder of
causes of
action against.

Claims by or against an executor or administrator as such, may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator (*s*).

ford, 1 Salk. 299; *Wentworth*, Off. Exors. c. 2; *Lockier v. Smith*, 1 Sid. 79; 1 Keb. 313; *Hudson v. Hudson*, 1 Atk. 461.

(*i*) *King v. Thom*, 1 T. R. 487.

(*k*) *Catherwood v. Chabaud*, 1 B. & C. 150; 2 Dowl. & R. 271; 25 R. R. 339; *Court v. Partridge*, 7 Price, 591.

(*l*) *Barker v. Talcot*, 1 Vern. 473; Judicature Act, 1873, s. 25 (11).

(*m*) 2 Wms. Saunders, 117, *d*.

(*n*) *Ord v. Fenwick*, 3 East, 104. As to money lent, see *Webster v. Spencer*, 3 B. & Ald. 365; 22 R. R. 427.

(*o*) *Cowell v. Watts*, 6 East, 405; 9 Smith, 410.

(*p*) *Marshall v. Broadhurst*, 1 C. & J. 403; *Edwards v. Grace*, 2 M. & Wels. 190; 5 Dowl. 302.

(*q*) *Jobson v. Forster*, 1 B. & Ad. 6.

(*r*) *Dowbiggin v. Harrison*, 9 B. & C. 666; 4 Man. & R. 662.

(*s*) Ord. XVIII. r. 5. Formerly in an action against an executor, on a bill or note of his testator, a count for money had and received by the defendant as executor could not be joined;

Jennings v. Newman, 4 T. R. 347; *Ashby v. Ashby*, 7 B. & C. 444; 1 Man. & R. 180; 31 R. R. 242; nor a count for money lent to the executor; *Rose v. Bowler*, 1 H. Bla. 108; nor a count for goods sold to the executor, or work done for him. *Corner v. Shew*, 3 M. & W. 350; *Kitchenman v. Skell*, 3 Ex. 49. A count for money paid to the use of the executor probably might. *Ashby v. Ashby*, *supra*. A count on an account stated by the executor of monies due from the testator might be joined; *Secar v. Atkinson*, 1 H. Bla. 102; and so might a count on an account stated by the executor of monies due from him as executor. *Powell v. Graham*, 7 Taunt. 581; 1 Moo. 305; 18 R. R. 593; *Ashby v. Ashby*, *supra*. Wherever the judgment on a count common was *de bonis testatoris* the count might be joined; but where the judgment was *de bonis propriis* it could not. See 2 Wms. Saun. 117, *c*.; *Hall v. Huffam*, 2 Lev. 228; *Curtis v. Davis*, Lev. pt. II. 110; *May v. Woodward*, 1 Freem. 247.

An executor cannot complete his testator's indorsement by delivering the instrument (*t*), which has been already signed by the testator.

It has been said that an indorsement by one of several co-executors, in his own name alone, will not suffice to transfer the property in a bill of exchange, although it be an indorsement in fact, for forgery of which an indictment may be sustained (*u*).

Executors and administrators, like agents, may be personally liable on making, drawing, indorsing, or accepting negotiable instruments, even though they describe themselves as such, unless they expressly confine their promise to paying out of the estate, or otherwise negative personal liability (*x*).

An infant can make a binding contract for necessities only; and he may give a *single bill* (which is a bond without a penalty) for the exact sum due for necessities, but not a bond with a penalty, or carrying interest (*y*).

What are to be considered necessities (*z*) depends on the rank and circumstances of the infant in the particular case.

All his other contracts were of two sorts, *voidable* and *void*. A distinction of importance: first, because a voidable contract might be afterwards affirmed, but a contract absolutely void was incapable of confirmation (*a*); and, secondly,

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Delivery by executor after indorser's death.

Whether one of several can indorse.

When an executor is personally liable.

INFANTS.

(*t*) *Bromage v. Lloyd*, 1 Exch. 32; 16 L. T., Ex. 257.

(*u*) *Winterbottom's case*, 1 Denison's C. C. 51; 2 Car. & Kir. 37. It has been so held in America. *Smith v. Whiting*, 9 Mass. Rep. 320. But it has also been there held that a note may be transferred by one of several administrators; *Sanders v. Blane*, 6 J. J. Marsh, 446; and by one of several executors, as a collateral security for a judgment against the estate. *Wheeler v. Wheeler*, 9 Cowan, 34.

(*w*) *Childs v. Monins*, 2 B. & B. 460; 5 Moo. 281; 23 R. R. 513; *King v. Thom*, 1 T. R. 489; *Ridout v. Bristow*, 1 Tyrw. 90; 1 C. & J. 231; 35 R. R. 710; *Serle v. Waterworth*, 4 M. & W. 9; 6 Dowl. 684; *Nelson v. Serle*, 4 M. & W. 795; *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24;

Code, ss. 26 and 31 (5).

(*y*) Co. Litt. 172, *a.*, n. 2; *Russell v. Lee*, 1 Lev. 86; and, therefore, a bond cannot be set up by a promise to pay made after full age, and the replication of such promise is ill. *Baylis v. Dineley*, 3 M. & Sel. 477; see B. N. P. 182; *Hunter v. Agnew*, 1 Fox & Smith, 15; 1 Rol. Ab. 729; *Fisher v. Mowbray*, 8 East, 330. A bond with a penalty given by an infant seems to be absolutely void. *Ayliffe v. Archdale*, Cro. Eliz. 920; Vin. Ab. Actions, D. d. So a deed given for necessities was voidable. *Martin v. Gale*, L. R., 4 Ch. D. 428.

(*z*) See the observations of the Court in a very singular case; *Chappell v. Cooper*, 13 M. & W. 252.

(*a*) But see *Williams v. Moore*, 11 M. & W. 256.

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because a void contract might be treated by other parties as a nullity, but contracts voidable could only be avoided by the contracting party himself. Yet the precise criterion of this distinction was not in the case of infancy clearly settled. According to some authorities it depended entirely on the *mode* of the transaction ; and all such gifts, grants or deeds of an infant as took effect by the delivery of his hand, were only voidable ; whereas such as did not so take effect were void (*b*). According to others, if the act was for the advantage of the infant it was voidable : if for his disadvantage, absolutely void (*c*).

Infant's
acceptance.

The acceptance of an infant was at all events invalid (*d*), and could not be confirmed by a promise to pay made after he was of age, and *after* action brought (*e*). And all his contracts made in the course of trade were formerly considered absolutely void and incapable of confirmation, though the moral obligation to fulfil them would support an express promise to pay after full age, and before action brought (*f*). It has been held that no mere acknowledgment, or part payment, would, under such circumstances, create a liability (*g*). But from later cases it appeared that an infant's contract on a bill or note was voidable only (*h*), and that his liability might be established by ratification after full age (*i*).

Ratification.

The stat. 9 Geo. 4, c. 14, enacted, that no action shall be maintained whereby to charge any person upon any promise made after full age, to pay any debt contracted during

(*b*) Perkins, 2.

(*c*) *Zouch v. Parsons*, 3 Burr. 1794, recognized as law by Lord Eldon in — v. *Hudcock*, 17 Ves. jun. 383 ; and see *Holt v. Ward*, 2 Stra. 937 ; *Williams v. Moore*, 11 M. & W. 256. A voidable contract has been defined as a contract valid till disaffirmed. *Allen v. Allen*, 2 D. & W. 307 ; 1 C. & L. 427 (Irish). An infant is not liable on a bill or note under any circumstances. *In re Soltykoff*, 1891, 1 Q. B. 415.

(*d*) *Williamson v. Watts*, 1 Camp. 552 ; and see *Williams v. Harrison*, Carthew, 160 ; 3 Salk. 197.

(*e*) *Thornton v. Illingworth*, 2 B. & C. 824 ; 4 Dowl. & R. 545.

(*f*) *Ibid.* ; *Hunt v. Massey*, 5

B. & Ad. 902 ; 2 Nev. & M. 109. Whether a ratification be in all cases a new contract, resting on the original obligation as a moral consideration, or whether it merely impart validity to the original promise, has been considered doubtful. *Williams v. Moore*, 11 M. & W. 256 ; but see *Harris v. Wall*, 1 Exch. 122.

(*g*) *Thrupp v. Fielder*, 2 Esp. 628. Such is the law in America. Byles on Bills, 6th American edition, p. 96.

(*h*) Such also is the result of the American authorities. See Byles on Bills, 6th American edition, p. 96.

(*i*) *Harris v. Wall*, 1 Exch. 122.

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infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. Oral evidence might supply defects in the written ratification as to the sum, the date, and the person to whom it is addressed (*k*).

By the Infants Relief Act, 37 & 38 Vict. c. 62, s. 1, it is provided that all contracts, whether by specialty or simple contract, entered into by infants to repay money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void ; the effect of this section is limited by a proviso to such as are now by law voidable. And s. 2 enacts that no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, with or without new consideration for such promise or ratification after full age.

Infants Relief Act.

By the 55 Vict. c. 4, s. 5, any agreement by an infant after coming of age to repay any loan void in law, and any negotiable instrument given in pursuance of such agreement is absolutely void, as against all parties.

A person of full age, who accepts a bill drawn while he was an infant, is liable on the bill (*l*).

Before this statute an infant might, after coming of age, ratify an account stated (*m*). But unless he had complete information, and full knowledge of the transaction, his ratification would not bind in equity (*n*). It is conceived that a bill drawn, indorsed, or accepted in blank by an infant, and filled up without his express consent after he is of full age, would not bind him (*o*).

Blank acceptance or indorsement.

Whether a promissory note, given by an infant for necessities, be valid, either at the suit of the original payee, or

Note for necessities.

(*k*) *Hartley v. Wharton*, 11 Ad. & Ell. 934. A debt contracted by an infant, if not ratified in writing, did not support a set-off. *Rawley v. Rawley*, L. R., 1 Q. B. Div. 460. A promise to pay as a "debt of honour" was held no good ratification. *Maccord v. Osborne*, L. R., 2 C. P. Div. 568.

(*l*) *Stevens v. Jackson*, 4 Camp. 164. In *Belfast Bank v. Doherty*, 4 Irish L. R. 124, an infant was held liable on an acceptance given

after full age for debts contracted during infancy, though s. 2 of the Act of 1874 would have prevented the drawer (the creditor) or a party with notice (*Smith v. King*, 1892, 2 Q. B. 543) from suing on the ratification. But such a case is now within the Act of 1892.

(*m*) *Williams v. Moore*, 12 L. J., Ex. 253 ; 11 M. & W. 256.

(*n*) *Kay v. Smith*, 21 Beav. 522.

(*o*) *Hunt v. Massey*, 5 B. & Ad. 902 ; 2 Nev. & M. 109.

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his indorsee, had until recently never been expressly decided ; but, it should seem, it is not, for even if not transferable it carries interest (*p*). An infant was not, even before the late statute, bound by an account stated, in respect even of necessities (*q*).

Party with
another.

If an infant be a party, jointly with an adult, to a negotiable instrument, the owner may sue the adult alone, without taking notice of the infant (*r*). Where an infant is partner in a firm, unless on coming of age, he notifies the discontinuance of the partnership, he is liable for contracts made by the firm after his majority (*s*).

Liability
ex delicto.

Where an infant was not liable on a contract, he could not be made liable thereon by suing him in an action in form *ex delicto* (*t*). Thus he was not liable on a contract because he represented himself to be of full age, nor could the plaintiff reply that fact on equitable grounds (*u*).

May convey
title to a bill.

An infant drawing and indorsing bills may convey a title to the indorsee, so that the indorsee can sue the acceptor and all other parties, except the infant himself (*x*) ; but the

(*p*) *Trueman v. Hurst*, 1 T. R. 40 ; *Bayley*, 19 ; *Williamson v. Watts*, 1 Camp. 552. In the United States it has been decided that a promissory note given by an infant for necessities is void. *Swansea v. Vanderkeyden*, 10 Johns. Rep. 33 ; *Nightingale v. Withington*, 15 Massey's Rep. 272. See further, Byles on Bills, 6th American edition, p. 99. So in the French law, Pardessus, 2, 459. This has at length been so decided. *Bateman v. Kingston*, 6 Irish L. R. 328. *In re Soltyskoff*, [1891] 1 Q. B. 15.

(*q*) *Trueman v. Hurst*, 1 T. R. 40 ; *Bartlett v. Emery*, *ibid.* 42, n. ; *Ingledeu v. Douglas*, 2 Stark. 36 ; unless ratified, *Williams v. Moore*, *supra* ; *Kay v. Smith*, 21 Beav. 522.

(*r*) *Burgess v. Murrell*, 4 Taunt. 468 ; *Chandler v. Parkes*, 3 Esp. 76, n. So if an infant be partner in a firm, judgment should issue against the other partners only, and so too a receiving order. *Lovell v. Beauchamp*, 1894, Ap. Ca. 607 ; 63 L. J. 802.

(*s*) *Good v. Harrison*, 5 B. & Ald. 147.

(*t*) *Grove v. Nerille*, 1 Keb. 778 ; *Johnson v. Pye*, 1 Keb. 905—913 ; 1 Lev. 169 ; *Manby v. Scott*, 1 Sid. 109 ; *Jennings v. Rundall*, 8 T. R. 335 ; 4 R. R. 680 ; *Price v. Hewitt*, 8 Exch. 146 ; and see *Cranch v. White*, 1 Bing. N. C. 417 ; 1 Scott, 314. But in some cases he is liable for fraud. Byles on Bills, 6th American edition, p. 100 ; *Nelson v. Stocker*, 28 L. J., Cha. 760 ; *Re King*, 27 L. J., Bkcty. 33 ; see *Wright v. Leonard*, 11 C. B., N. S. 258. See also *Burnard v. Haggis*, 32 L. J., C. P. 191, where an infant who had hired a horse was held liable for its misuse.

(*u*) *Bartlett v. Wells*, 1 B. & S. 836 ; 31 L. J., Q. B. 57 ; but see now *Lempriere v. Lange*, L. R., 12 Ch. D. 675.

(*x*) Code, s. 22 (2). *Taylor v. Croker*, 4 Esp. 187 ; *Nightingale v. Withington*, 15 Mass. American Rep. 272 ; and see *Drayton v. Dale*, 2 B. & C. 299, 302 ; 26 R. R. 360, 361 ; *Grey v. Cooper*, 1 Selw.

infant may avoid the contract, except where the acceptor has estopped himself by admitting (as we shall see he does) the capacity of an infant drawer to indorse (*y*).

CHAPTER
V.

An infant may sue on a bill (*z*). But payment should be made to his guardian ; yet payment to the infant may, under some circumstances, be good (*a*).

Infant may
sue.

An infant is not in a case of contract estopped by his own representations (*b*).

Estoppel.

The exercise of undue influence over persons of full age giving bills, notes or other securities, affords ground for the interference of a Court of Equity, which will either set aside the securities, or by a perpetual injunction restrain all proceedings (*c*). This jurisdiction is not confined to the case of guardian and ward, but applies wherever there exists between the parties a relation or connection constituting anything like a trust or guardianship, or conferring authority, control or influence. It comprehends parents and step-parents, and may extend to other relatives, according to the circumstances of the case. It reaches not only regular medical men, but quacks and impostors. It comprehends legal advisers, such as counsel or attorney, and extends to ministers of religion of any persuasion. In these cases the Court will not suffer any such securities to be enforced, unless satisfied that they were given freely and voluntarily, and independently of any influence over the giver (*d*), and the burden of proof lies on the upholder

PERSONS
UNDER
UNDUE
INFLUENCE.

N. P. ; see *Smith v. Johnson*, 27 L. J., Exch. 363 ; 3 H. & N. 222.

(*y*) It may be doubtful if this is so now, as Code, s. 22 (2) fully recognizes the title of the holder against the other parties made through an infant's indorsement.

(*z*) Chitty, 20 ; *Warwick v. Bruce*, 2 M. & Sel. 205 ; 14 R. R. 634 ; *Holliday v. Atkinson*, 5 B. & C. 501 ; 8 D. & R. 163 ; 29 R. R. 299. By next friend, see Ord. XVI. r. 16.

(*a*) Bayley, 255.

(*b*) *Cunnam v. Farmer*, 3 Exch. 698. Has been made a bankrupt. *Ex parte Lynch*, L. R., 2 Chan. D. 277. But see now *In re Jones*, 18 Ch. D. 109.

(*c*) *Harrey v. Mount*, 14 L. J., Chan. 223 ; *Archer v. Hudson*, 15

L. J. 211 ; *Maitland v. Irwing*, 16 L. J. 95 ; *Rhodes v. Bate*, 35 L. J. 267, and authorities there collected ; *Lyon v. Home*, L. R., 6 Eq. 656, and cases cited.

(*d*) *Eskey v. Lake*, 22 L. J., 336 ; *Williams v. Bayley*, L. R., 1 H. L. 200 ; *Ford v. Olden*, L. R., 5 Eq. 461 ; *Kempson v. Ashbee*, L. R., 10 Chan. Ap. 15. See also the remarks of Lord Selborne in *Morris v. Lord Aylesford*, L. R., 8 Chan. Ap. 484. There is no presumption of undue influence exerted by a husband over his wife to obtain her signature to a promissory note, the jury must find that as a fact, to release her from liability on it. *Sanguinetti v. Messiter*, 2 Times R. 135. Acquiescence after the

CHAPTER
V.LUNATICS,
IDIOTS AND
NON COM-
POTES.

of the instrument (*e*). The defendant in an action at law might avail himself of this defence by pleading an equitable plea, or now the facts (*f*), which however would not, it is conceived, be a good defence against a holder in due course.

It is a general rule of universal law, that the contracts of a lunatic, an idiot, or other person *non compos mentis* from age or personal infirmity, are utterly void (*g*). And the old authorities in the English law, that a man cannot be allowed to stultify himself by alleging his own lunacy, are shaken by the modern decisions (*h*).

But it had been before held, that if a note be made by a lunatic or person of imbecile mind, known to be so by the payee, it is a fraud in the payee, and the note is void even in the hands of an indorsee, at least if there be anything unusual on the face of the note (*i*). So, if the consideration be executory merely, it was said that it might perhaps be void, though the party dealing with the lunatic were not cognizant of his infirmity (*k*). But it was held that a defendant could not set up his own insanity as a defence, unless it were known and taken advantage of by the plaintiff, so that there was a fraud in him (*l*). And it still seems that, according to the English law, in order to avoid a fair contract on the ground of lunacy, the mental incapacity must be known to the other contracting party (*m*).

undue influence ceases constitutes laches and bars the redress. *Allcard v. Skinner*, 36 Ch. D. 145; 56 L. J. 1052.

(*e*) *Lyon v. Home*, L. R., 6 Eq. 681.

(*f*) *Heap v. Marris*, L. R., 2 Q. B. D. 630.

(*g*) *Furiosus nullum negotium gerere potest, quia non intelligit quid agit.* Inst. Lib. 3, tit. 20, s. 8; Dig. Lib. 50, tit. 1. 5, 40, 124.

(*h*) Kent's Comm. 451; and see the observations of Parke, B., in *Gore v. Gibson*, 13 M. & W. 623; and *Alcock v. Alcock*, 3 M. & G. 268.

(*i*) *Sentence v. Poole*, 3 C. & P. 1; *Baxter v. Lord Portsmouth*, 2 C. & P. 178; 5 B. & C. 170; 8 Dowl. & R. 614.

(*k*) Ibid.

(*l*) *Brown v. Joddrell*, 1 M. & M. 105; 3 C. & P. 30; *Lery v.*

Baker, 1 M. & M. 106; *Imperial Loan Co. v. Stone*, 1892, 1 Q. B. 599; but see *Gore v. Gibson*, 13 M. & W. 623; and the contract affected thereby. *Jenkins v. Morris*, L. R., 14 Ch. D. 674. In *Putnam v. Sullivan*, 1 Mass. Amer. R., it is said by Parsons, C. J., "that perhaps, if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him, he would not be liable as indorser, because he is not guilty of any laches." He must plead the fraud specially. Ord. XIX. rr. 6, 15.

(*m*) *Molton v. Camroux*, 4 Exch. Rep. 19; *Beavan v. M'Donnell*, 9 Exch. 309; *Elliot v. Ince*, 26 L. J., Chan. 821; 7 De G., M. & G. 475. But the law of America seems more in accordance with general law, where it has been held that incapacity to contract

Imbecility of mind cannot be proved under a plea that defendant did not make a promissory note (*n*).

CHAPTER
V.

It was formerly held, that a man could not protect himself from any deed or agreement by pleading drunkenness, unless he also showed that the drunkenness was brought about by the management and contrivance of him who procured the deed or contract (*o*). And this may still be the law in a case of *partial* drunkenness.

Pleading.
PERSONS
DRUNK.

But where there is *total* drunkenness the modern decisions have qualified the old doctrine. Total drunkenness producing a complete and manifest though temporary suspension of reason, is of itself a defence to an action on a bill or note between the parties, or those with notice (*p*). "It is just the same," says Alderson, B., "as if the defendant had written his name on the bill in his sleep in a state of somnambulism" (*q*).

Partial or
total.

Somnam-
bulism.

But as an answer to an action on a bill or note, drunkenness must be specially pleaded (*r*).

Pleading.

The contracts of a married woman are void at the common law.

MARRIED
WOMEN.

Without authority from her husband, therefore, she cannot at the common law charge either him or herself, by making, drawing, accepting or indorsing negotiable instruments (*s*); not even if she live apart from him, and have a separate maintenance secured by deed (*t*). Nor after a valid divorce, *à mensa et thoro* (*u*); though it is otherwise after a complete divorce, *à vinculo matrimonii*, which annuls the marriage to all purposes. And even if she be a sole

arising from drunkenness makes a note void and incapable of confirmation. See Byles on Bills, 6th American edition, p. 104.

(*n*) *Harrison v. Richardson*, 1 Mood. & Rob. 504.

(*o*) *Johnson v. Medlicotte*, 3 P. Wms. 130; *Cooke v. Clayworth*, 18 Vesey, 12; 11 R. R. 137.

(*p*) *Molton v. Camroux*, 2 Exch. 487; 4 Exch. 17. In *Matthews v. Barter* a replication of a ratification when sober was held good on demurrer. L. R., 8 Ex. 132.

(*q*) *Gore v. Gibson*, 13 M. & W. 623. Marriages have been set aside on this ground. *Browning*

v. Reane, 2 Phil. 69.

(*r*) Ord. XIX. r. 15.

(*s*) She cannot convey a title to third persons as infants and corporations can. *Burlew v. Bishop*, 1 East, 432; 3 Esp. R. 266.

(*t*) *Marshall v. Rutton*, 8 T. R. 545; 5 R. R. 448. In one case the Court of C. P. refused to discharge out of custody a married woman, who had been arrested as the drawer of a bill of exchange. *Jones v. Lewis*, 7 Taunt. 54; 2 Marsh. 385.

(*u*) *Lewis v. Lee*, 3 B. & C. 291; 5 D. & R. 90.

CHAPTER
V.

trader in London by the custom of the city, she is not liable at all in the superior Courts, and in the city Courts her husband must be joined for conformity, though execution will be against the wife alone (*x*).

Fraud.

And it is conceived, that though husband and wife are in general liable for the wrongs and frauds perpetrated by the wife, yet they are not liable for a fraudulent representation by her which is parcel of a contract (*y*).

Estoppel.

Nor can a married woman be estopped by her own representation that she is discovert (*z*). But an acceptor may be estopped from disputing her competency (*a*).

Separate
estate of a
married
woman.

But if a married woman have a separate estate, and make a promissory note, or accept a bill of exchange, she is liable (*b*). And if, while she has a separate estate, she give a security for money lent, and after her husband's death promise to repay it, such promise is binding at law on herself and her executors (*c*). But if at the time the note was given she had not a separate estate, no such promise, after the death of her husband, will be valid (*d*). A promissory note given by a husband to his wife for money advanced by her to him out of her separate estate constitutes a declaration of trust in favour of the wife (*e*).

Absence of
the husband.

And if the husband has been transported, and is not returned to this kingdom, whether or no the term of his transportation be expired (*f*); or if he be an alien, and never was within the kingdom (*g*); or if the husband has been abroad and not heard of for seven years, after which period the legal presumption of his death arises :—in any

(*x*) *Beard v. Webb*, 2 B. & P. 93.

(*y*) *Liverpool Association v. Fairhurst*, 9 Exch. 422; *Wright v. Leonard*, 11 C. B., N. S. 258.

(*z*) *Cannum v. Farmer*, 3 Exch. 698.

(*a*) See the Chapter on ACCEPTANCE.

(*b*) Formerly only in equity. *Bullpin v. Clarke*, 17 Ves. 566; *Hulme v. Tenant*, 1 Bro. C. C. 16; *Stewart v. Kirkwall*, 3 Madd. 387; *Johnson v. Gallagher*, 30 L. J., Chan. 298; *McHenry v. Davies*, L. R., 10 Eq. 88; 39 L. J., Chan. 866; *Davies v. Jenkins*, L. R., 6 Chan. Div. 728;

Morrell v. Cowan, p. 166, *ibid. Query*, where there is a restraint on anticipation. See *Butler v. Cumpston*, 38 L. J., Chan. 35.

(*c*) *Lee v. Muggridge*, 5 Taunt. 36.

(*d*) *Lloyd v. Lee*, 1 Stra. 94; *Littlefield v. Shee*, 2 B. & Ad. 811.

(*e*) *Murray v. Glaspe*, 23 L. J., Chan. 126.

(*f*) *Carrol v. Blencow*, 4 Esp. 27; *Sparrow v. Curruthers*, cited 2 W. Bla. 1197, and more fully 1 T. R. 7. See *Derry v. Duchess of Mazarine*, 1 Ld. Raym. 147.

(*g*) *Kay v. Duchess de Pienne*, 3 Camp. 123.

one of these three cases she is liable in law for her contracts, as a single woman. Where the husband was transported for fourteen years, but instead of going abroad was confined in the hulks at Portsmouth, it was held that his wife, carrying on business in her own name, for the benefit of the family, might be made bankrupt, and that a bill, accepted by her under such circumstances, constituted a good petitioning creditor's debt (*h*).

Formerly, where a bill or note was given to a single woman, and she married, the property vested in her husband, and he alone could indorse it (*i*); and husband and wife *must* join in the action upon it (*k*); but if payable to order, marriage might operate as an indorsement, so as to enable the husband to sue alone (*l*). If not recovered upon or reduced into possession during their joint lives, it reverted to the woman, if she survived, or went to the husband as her administrator, if he survived (*m*).

Bill or note given to a woman before marriage.

So if after marriage the bill or note were made to the wife alone, the interest vested in the husband; he alone could indorse it (*n*). And his indorsement was effectual, though the instrument were part of her separate estate, and were indorsed by her husband in fraud of her, to an innocent holder for value (*o*). But if the husband died

After marriage.

(*h*) *Ex parte Franks*, 7 Bing. 762. As to property of a felon, see post, p. 79.

(*i*) *Connor v. Martin*, 3 Wilson, 5; 1 Stra. 516.

(*k*) Com. Dig. Baron and Feme, N.

(*l*) *MacNeillage v. Holloway*, 1 B. & Ald. 218. As to some observations of Lord Ellenborough, in this case, see the judgment of the Court of Queen's Bench, in *Hart v. Stephens*, 14 L. J., Q. B. 149; 6 Q. B. 943.

(*m*) Co. Litt. 351, *b*; *Coppin v. —*, 2 P. Wms. 407; *Day v. Padrone*, 2 M. & S. 396.

(*n*) *Connor v. Martin*, 1 Stra. 516; 3 Wils. 5; *Barlow v. Bishop*, 1 East, 433; *Mason v. Morgan*, 2 Ad. & Ellis, 30; 4 Nev. & M. 46; but the wife may convey a title by indorsing in her husband's name, by his authority. Ibid. And under her husband's authority, she may indorse in her own

name. *Prestwick v. Marshall*, 7 Bing. 565; 5 M. & P. 513; 4 C. & P. 594. And if, after an indorsement in her own name, the acceptor, seeing the bill with the indorsement upon it, promises to pay, that amounts to an admission by the acceptor that the indorsement was by the husband's authority. *Cotes v. Daris*, 1 Camp. 485. Where, in an action by the indorsee of a bill against the acceptor, the declaration alleged the bill to have been drawn and indorsed to the plaintiffs by a woman, to which the defendant pleaded that she was married, a replication that she drew and indorsed as the agent of her husband was held no departure and good. *Prince v. Brunette*, 1 Bing. N. C. 435; 1 Scott, 342; 3 Dowl. 382.

(*o*) *Dawson v. Prince*, 27 L. J., Chan. 169. *Quære*, whether the fact of a bill being drawn in

CHAPTER
V.

without a recovery on it, or reducing it into possession, the note belonged, at law, to the wife, and not to the husband's executors, and she must bring the action (*p*). If the consideration for the note were the husband's money, it is conceived that the wife would be a trustee for the husband's executors (*q*). The wife might join in an action on the instrument (*r*); but the husband might sue alone (*s*). If he sued alone he let in, by way of set-off, debts due from himself; if he joined his wife in the action, perhaps he let in, as a set-off, debts due to her *dum sola* (*t*).

If a note be given after marriage to husband and wife jointly as payees, it is conceived that the legal interest in the note survives to the survivor; so held as to an investment in stock (*u*).

But now claims by or against husband and wife may be joined with claims by or against either of them separately (*x*).

Reduction
into possession of a
wife's chose
in action.

What amounted to a reduction of the wife's chose in action into possession was a question of considerable nicety. It is conceived that indorsing a note over was such a reduction (*y*). But the bankruptcy of the husband was not a reduction of the wife's choses in action into possession; and therefore the assignees of a bankrupt could not maintain an action in their own names *alone*, on a promissory note made by the wife of the bankrupt before her marriage (*z*). Nor was the receipt of interest by the husband (*a*) a reduction into possession, nor a direction by husband to banker to keep it separate from other monies, followed by a bequest in his will (*b*).

favour of a married woman is not notice, that it is part of her separate estate; certainly since the passing of the Married Women's Property Acts.

(*p*) *Betts v. Kimpton*, 2 B. & Ad. 273; *Richards v. Richards*, 2 B. & Ad. 447; 36 R. R. 619; *Guters v. Madely*, 6 M. & W. 423; *Hart v. Stephens*, 14 L. J., Q. B. 148; 6 Q. B. 937; *Scarpellini v. Atcheson*, 14 L. J., Q. B. 333; *Howard v. Oakes*, 18 L. J., Exch. 485; 3 Exch. 136. See this last case as to the form of pleading. Coverture of the plaintiff was only pleadable in abatement. *Guyard v. Sutton*, 3 C. B. 153.

(*q*) *Philliskirk v. Pluckwell*, 2 M. & Sel. 396.

(*r*) *Philliskirk et Uxor v.*

Pluckwell, 2 M. & Sel. 393; *Arnould v. Revault*, 1 B. & B. 443; 4 Moore, 70.

(*s*) *Burrough v. Moss*, 10 B. & C. 558; 5 M. & R. 296.

(*t*) *Ibid.*; but not debts due from himself alone. *Jones v. Cuthbertson*, L. R., 8 Q. B. 504.

(*u*) *In re Gadbury*, 32 L. J., By. 380.

(*x*) Ord. XVIII. r. 4.

(*y*) *Scarpellini v. Atcheson*, 14 L. J., Q. B. 333; 7 Q. B. 864.

(*z*) *Sherrington v. Yates*, in error, 12 M. & W. 855, reversing *Yates v. Sherrington*, 11 M. & W. 42.

(*a*) *Hart v. Stephens*, 6 Q. B. 937.

(*b*) *Scrutton v. Pattillo*, L. R., 19 Eq. 369; *Nicholson v. Drury*

CHAPTER
V.

Before the passing of the Married Women's Property Act, if a single woman, being a party liable on a bill or note, married, her husband became responsible, and they must have been sued jointly. If (the debt being still unsatisfied) he died, she was liable, and not his executors; if she died, her representatives were liable, if any, but not her husband, except in his representative capacity (c).

Bill or note given by a woman before marriage.

Where a joint and several promissory note was, during marriage, given to a feme executrix, by her husband and two other persons, it was held that after her husband's death she might sue the other makers (d). And though a note given by a wife to her husband was void, yet, if indorsed over by her husband, it was valid as between the husband and the indorsee (e).

Note by a husband to his wife.

Payment of a sum due on a bill or note to a married woman would not discharge the party making it, unless she had authority, express or implied, to receive payment. It should have been made to her husband (f).

Payment to a married woman.

By the 33 & 34 Vict. c. 93, s. 1, the wages and earnings of married women gained independently of their husbands, and money or property acquired by any literary, artistic or scientific skill, and all investments of the same, are deemed to be for their separate use independently of their husbands, and they alone can give good receipts.

Married Women's Property Act, and Amendment Act.

By sect. 7, Any woman married since the above date, and succeeding to any personalty as next of kin, or taking a sum of money not exceeding 200*l.* under any deed or will, shall have it to her separate use.

By sect. 11, A married woman may maintain an action in her own name to recover separate property, being hers under this Act, or before marriage, if her husband have agreed in writing, and the remedies, both civil and criminal, are to be taken in her name and as if she were still unmarried (g).

By sect. 12, A husband married after passing of Act was not to be liable for the debts of his wife contracted before marriage, but she, and her separate estate, if any, remained so; but this section was repealed by the 37 & 38 Vict. c. 51,

Buildings Co., L. R., 7 Chan. Div. 49; but a sale by a husband is, *Widgery v. Topper*, *ibid.* p. 423.

(c) *Mitchinson v. Hewson*, 7 T. R. 348.

(d) *Richards v. Richards*, 2 B. & Ad. 447; 36 R. R. 619.

(e) *Holy v. Lane*, 2 Atk. 182.

(f) Bayley, 256.

(g) See *Summers v. City Bank*, L. R., 9 C. P. 580.

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V.

s. 1, which enacts that a husband and wife married after the date of the Act, *i.e.*, 30th July, 1874, are to be sued jointly for the wife's debt incurred before marriage. Sect. 2 confines the liability of the husband in such actions, and in those founded on torts of the wife before marriage, to such assets as he may or ought to have received from his wife, provided he so plead; otherwise he will be deemed to have confessed assets.

The present
Acts.

Both these Acts were repealed (saving existing rights) by the 45 & 46 Vict. c. 75, amended by the 56 & 57 Vict. c. 63. These Acts do not extend to Scotland, for the law of which country see 44 & 45 Vict. c. 21; but include Ireland.

A married woman can acquire, hold and dispose of property, real or personal (including choses in action, sect. 24), without the intervention of a trustee; and she may sue and be sued, both in contract and tort, to the extent of her separate property, whether held at the time or subsequently acquired, just like a *feme sole*.

All her contracts *primâ facie* relate to and bind her separate property, subject to any restraint on anticipation, and if trading separately she may be made bankrupt.

By sect. 2, A woman married after Jan. 1st, 1883, is entitled to have as her separate property all she possessed at the time, as well as what she subsequently acquires or earns; if married before that date, only what is acquired or earned subsequently to the Act; subject in either case to any settlement there may be, or restraint on anticipation, which, however, will not bar her antenuptial debts, nor are creditors to be defeated thereby (sects. 5 and 19). For her antenuptial debts she still remains liable to the extent of her separate property, and so also her husband to the extent of what he may have received from or through her; and they may be sued jointly, and joint judgment recovered against him personally, and against her as to her separate property, and as to the residue, if any, against her separate property only (sects. 13—15).

Collusion between them is prevented by sect. 10, and a loan to a husband trader is postponed by sect. 3 to claims of other creditors.

The cases on these Acts are far too numerous to allow even an attempt to discuss them here; the general result seems to be that a married woman having a separate estate enjoys an independent legal existence so far as it is concerned, but that those dealing with her should take care to see that she possesses it (at the time) and is contracting

in respect of it (*h*), and not as agent for her husband. Her acceptance *primâ facie* binds her and not her husband, and in case of an instrument payable to her, she alone can indorse, or receive the money, and give a valid discharge.

CHAPTER
V.

Formerly by attainder the felon's personal property and choses in action vested in the Crown, without office found. The felon, till he had undergone his punishment, was incapable of taking. Therefore, if a bill were indorsed to him, he acquired no title to it (*i*); but now by the 33 & 34 Vict. c. 23, though he can bring no action and make no contract till after expiration of sentence, the administrator or interim curator may do so.

CONVICTED
FELONS.

A contract in favour of an alien enemy, not residing in this country by the king's licence, is void at law and in equity. Hence a bill drawn by an alien enemy on a British subject in England, and indorsed to a British subject abroad, cannot be enforced even after the restoration of peace (*k*).

ALIENS.

In general, a corporation can only contract by writing under their common seal (*l*).

CORPORATIONS AND
BANKING
COMPANIES.

(*h*) *Pulliser v. Gurney*, 19 Q. B. D. 519; 56 L. J., Q. B. 546. At the time is, since the Act of 1893, immaterial.

(*i*) *Bullock v. Dodds*, 2 B. & Ald. 258; 20 R. R. 420.

(*k*) *Willison v. Patteson*, 7 Taunt. 439; 1 Moore, 333; 18 R. R. 525; *Brandon v. Nesbitt*, 6 T. R. 23; 3 R. R. 109.

(*l*) The Code confers no fresh powers on Corporations to accept, make, draw, or indorse bills and notes, s. 22 (1), though it allows title to be made through their drawing and indorsing, s. 22 (2); and though it does not require the bills or notes of those competent to contract on them to be under seal, yet makes the use of a seal optional, s. 91; hence the old common law rule that bills or notes being simple contracts could not be under seal, at least so as to remain negotiable, is apparently obsolete. Most of the decisions as to the negotiability of securities issued by Corporations and Companies turned on the point of estoppel, viz., that where

a Company or Corporation had issued debentures or securities under seal professing to be negotiable, they should not be heard to take the objection and contend that equities attached as against a transferee for value, *In re Natal Investment Co.*, L. R., 3 Chan. App. 355; *China Steamship Co.*, 38 L. J., Chan. 199; L. R., 4 Chan. App. 240. See the case of the *Blakeley Ordnance Co.*, L. R., 3 Chan. App. 154, where the negotiability of such an instrument, and indeed its validity, is questioned; *Watson v. Mid Wales Railway Co.*, L. R., 2 C. P. 593; *Ex parte Chorley*, L. R., 11 Eq. 157; *Hercules Insurance Co.*, L. R., 19 Eq. 302; *Dickson v. Vale of Ncath Railway Co.*, L. R., 4 Q. B. 44; 39 L. J., Q. B. 17; *In re General Estates Co.*, L. R., 3 Chan. App. 758; *In re Imperial Land Co. of Marseilles*, 40 L. J., Chan. 93; L. R., 11 Eq. 478. Directors issuing such a debenture without authority have been held personally liable, as for a breach of warranty, *Weekes v. Propert*,

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V.

But to this rule there are exceptions (*m*). And among them is the power of issuing bills or notes enjoyed by a company incorporated for the purposes of trade, the very object of whose institution requires that they should exercise this privilege (*n*).

But a company incorporated for carrying on public works is not a corporation within the above exception (*o*).

L. R., 8 C. P. 427; *Webb v. Herne Bay Commissioners*, L. R., 5 Q. B. 642; 39 L. J., Q. B. 223. In *Crouch v. The Crédit Foncier Co.*, L. R., 8 Q. B. 374, where one of these so-called negotiable debentures was stolen and ultimately came into the hands of a holder for value without notice, he was held unable to recover against the company on the ground that, such an instrument not being at law negotiable, his title must be deduced through the thief, a person incapable of acquiring or transmitting title. But in the most recent case on the subject (*Bechuanaland Co. v. London Trading Bank*, 1898, 2 Q. B. 658; 67 L. J. 967) it was held that *Crouch v. The Crédit Foncier Co.* was virtually overruled by *Goodwin v. Roberts*, L. R., 1 App. Ca. 477, and that evidence of a well-established practice on the Stock Exchange to treat bearer debentures issued by an English company here as negotiable was proof of a custom among merchants so to do.

"An instrument can only be negotiable by statute or custom," per L. J. Fry, in *Picker v. London and County Bank*, 18 Q. B. D. 515; 56 L. J., Q. B. 299; *Goodwin v. Roberts*, L. R., 1 App. Ca. 477. What constitutes a debenture seems not yet very clearly settled, see *British India Steam Ship Co. v. Commissioners of Inland Revenue*, 7 Q. B. D. 165; 50 L. J. 517; *Lery v. Abercorris Slate Co.*, 37 Ch. D. 260; though the Stamp Act of 1870, Sched. tit. DEBENTURE, clearly ranked them with mortgages and bonds and imposed the same scale of duties; as also did the Customs and Inland Revenue Act of 1888,

51 Vict. c. 8, Sched. 1, and the last general Stamp Act of 1891, 54 & 55 Vict. c. 39.

The following instruments have been held negotiable here by custom, Exchequer Bills, *Wookey v. Pole*, 4 B. & Ald. 1; 22 R. R. 594; *Brandao v. Barnett*, 6 M. & G. 630; 3 C. B. 519; Dividend Warrants, *Partridge v. Bank of England*, 13 L. J., Q. B. 281; 9 Q. B. 424; Code, ss. 95 and 97(*d*); Scrip, *Goodwin v. Roberts*, L. R., 10 Ex. 337; 44 L. J., Ex. 57 and 157; *Rumball v. Metropolitan Bank*, L. R., 2 Q. B. D. 194; Bonds of Foreign Princes and States payable to bearer, *Gorgier v. Mierille*, 3 B. & C. 45; 27 R. R. 290; *Att.-Gen. v. Bouwens*, 4 M. & W. 171 and 180; Foreign Railway and other bonds, *London Joint Stock Bank v. Simmons*, 1892, App. Ca. 201; *Venables v. Baring*, 1892, 3 Chan. 527; 61 L. J. 609; *Bentinck v. London Joint Stock Bank*, 1893, 2 Chan. 120. In the case of the *London and County Bank v. London and River Plate Bank*, 21 Q. B. D. 535; 57 L. J. 601, the Court refrained from giving any opinion on the negotiability of the bonds (Egyptian Unified, &c.), the point not being raised on either side, but treated them as such.

(*m*) The reader will find them enumerated in the case of *East London Waterworks Company v. Bailey*, 4 Bing. 288; and see *Henderson v. Australian Company*, 5 E. & B. 409; *Haigh v. North Bierley Union*, 1 E., B. & E. 873.

(*n*) *Broughton v. Manchester Waterworks Company*, 3 B. & Ald. 1; 22 R. R. 278.

(*o*) A railway company cannot accept, draw, or indorse a bill of

Without a special authority, express or implied, a corporation has no power to make, accept, draw, or indorse bills or notes (*p*). And the defence might be raised by demurrer to the declaration, plea denying acceptance, or, if there were a power not duly exercised, by a general traverse (*q*).

A corporation might, like natural persons, sue in assumpsit. The old doctrine that when a corporation is plaintiff the consideration must not be executory, so that promises by it need to be alleged (*r*), seems to be overruled (*s*). And a corporation is liable to be sued in the ordinary forms of action, on negotiable instruments, wherever it has the power to issue them (*t*). Form of action.

The capacity of corporations and banking companies to make, draw or accept negotiable instruments, is further narrowed by the following enactment, contained in the various statutes passed for protecting the privileges of the Bank of England (*u*): "That it shall not be lawful for any body, politic or incorporate, whatsoever, or for any other persons whatsoever, united or to be united in covenant or partnership, exceeding the number of six persons in England, to borrow, owe or take up any sum or sums of money on their bills or notes payable at demand, or at any less time than six months from the borrowing thereof, during the continuance of the privilege of banking granted to the Governor and Company of the Bank of England" (*x*). Bank of England.

It has been held that these restrictions do not affect a *commercial* firm consisting of more than six persons (*y*).

exchange. Ibid.; *Bateman v. Mid Wales R. Co.*, L. R., 1 C. P. 499; 35 L. J., C. P. 205. This disability, however, seems not to extend to companies incorporated here for carrying on works abroad. See case of *Peru Railway Company*, L. R., 2 Chan. Ap. 617.

(*p*) Ibid. p. 8, Bayley, J. So as to bind themselves, though, like infants, they may convey title by drawing or indorsing. See ante, p. 38, and Code, s. 22.

(*q*) *Hill v. Manchester and Salford Waterworks Company*, 5 B. & Ad. 866; 39 R. R. 689.

(*r*) *Mayor of Stafford v. Till*, 4 Bing. 75; 12 Moore, 260.

(*s*) *Church v. Imperial Gas B.B.E.*

Company, 6 Ad. & E. 861; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Paine v. Guardians of the Strand Union*, 15 L. J., M. Ca. 89; 8 Q. B. 326; *Lamprell v. Billericay Union*, 3 Exch. 283; *Mayor of Kidderminster v. Hardwick*, L. R., 9 Ex. 13.

(*t*) *Murray v. East India Co.*, 5 B. & Ald. 204; 24 R. R. 325.

(*u*) 39 & 40 Geo. 3, c. 28, s. 15.

(*x*) For the history and exclusive privileges of the Bank of England more at large, see the case of *The Bank of England v. Anderson*, 3 Bing. N. C. 589; 4 Scott, 50; Keen, 328.

(*y*) *Wigan v. Fowler*, 1 Stark. 459.

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But in consequence of the panic in the latter part of the year 1825, the Bank of England consented to forego a portion of their exclusive privilege ; and the 7 Geo. 4, c. 46, enacts, accordingly, that corporations or co-partnerships of more than six in number, carrying on business more than sixty-five miles from London, may issue bills or notes payable on demand, and that such corporations or co-partnerships may issue notes or bills amounting to 50*l.* payable in London or elsewhere at any period after date or sight (*z*).

The third section declares, that any such corporation or partnership may discount bills not drawn by or upon them.

Each offence against the provisions of the act subjects to a penalty of 50*l.*

The act by which the Bank Charter was renewed in 1833, the 3 & 4 Will. 4, c. 98, continued the privileges bestowed on the Bank of England by the 39 & 40 Geo. 3, and subsequent acts, subject to termination on twelve months' notice to be given after the 1st August, 1844. The privileges of the bank are now further continued by the 7 & 8 Vict. c. 32, subject to termination on twelve months' notice to be given after the 1st August, 1855.

The 3 & 4 Will. 4, c. 98, provides that no bank of more than six persons shall issue in London, or within sixty-five miles thereof, bills or notes payable on demand, saving the rights of country bankers to make their notes payable in London (*a*).

The 3 & 4 Will. 4, c. 98, further declares that other corporations and companies of more than six persons may carry on the business of banking in London, provided they do not issue bills or notes at less than six months' date (*b*).

That the notes of the branch banks of England shall be made payable where issued (*c*).

The Bank of England can issue bank notes unstamped (*d*), and has the exclusive privilege of doing so within the city of London and three miles thereof (*e*).

(*z*) The limitation of 50*l.* appears to be abolished by the 3 & 4 Will. 4, c. 83, s. 2, and 7 & 8 Vict. c. 32, s. 26. As to the mode of recovering penalties, see 8 & 9 Vict. c. 76, s. 5.

(*a*) 3 & 4 Will. 4, c. 98, s. 2.

(*b*) Sect. 3. Therefore a banking partnership of more than six persons in London, or within sixty-five miles thereof, could not accept a bill at less than six

months drawn upon them by a customer. *Bank of England v. Anderson*, 3 Bing. N. C. 589 ; 4 Scott, 50 ; Keen, 328. But the restriction is relaxed by the 7 & 8 Vict. c. 32, s. 26, except as to instruments payable to bearer on demand.

(*c*) 3 & 4 Will. 4, c. 98, s. 4.

(*d*) 7 & 8 Vict. c. 32, s. 7.

(*e*) 9 Geo. 4, c. 23, s. 1.

No person who was not a banker issuing his own notes on the 6th of May, 1844, can now issue bank notes (*f*).

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Bank notes under 5*l.* payable to bearer on demand are prohibited in England (*g*).

No new banks of issue.

Bank notes under 5*l.* prohibited.

Banks not containing more than ten partners.

Banks of ten, formerly six, or fewer than six persons, existing as banks of issue before the 6th May, 1844, may issue bills and notes and promissory notes payable to bearer on demand, on unstamped paper (except within the city of London and three miles thereof), within the provisions of 9 Geo. 4, c. 23, s. 1.

Banking corporations and companies of more than ten (formerly six) persons cannot issue in London or within sixty-five miles thereof any bill or note payable on demand (*h*).

Banks of more than ten partners.

Every member of a banking partnership is liable to the payment of outstanding notes, though he were not a partner when they were issued (*i*).

But a more lengthened and minute inquiry into the provisions of these and other statutes regulating the rights and duties of the Bank of England and other banks of issue would be a digression from the main subject of this work. Such a discussion would find a more appropriate place in a treatise on the law of Banks of Issue, Deposit and Exchange.

The law as to the liability of joint-stock companies drawing, accepting or indorsing bills, involves some nice distinctions, and is not yet very clearly settled.

JOINT-STOCK
COMPANIES.

As to joint-stock companies at the common law, it is conceived to be a general rule, that if the directors accept simply in their own names, with or without authority to do so, they, and they only, are liable at law on the bills (*k*).

At common law.

(*f*) 7 & 8 Vict. c. 32, ss. 10, 11, 12. This privilege extends to a surviving partner in a banking firm. *Smith v. Everett*, 29 L. J., Chanc. 236. But in case of sale of a banking business, see *A. G. v. Birkbeck and Others*, L. R., 12 Q. B. D. 605.

(*g*) 7 Geo. 4, c. 6; 9 Geo. 4, c. 65.

(*h*) 39 & 40 Geo. 3, c. 28, s. 15; 3 & 4 Will. 4, c. 98, s. 3; and see 3 & 4 Will. 4, c. 83, s. 2. See

further, *Bank of England v. Anderson*, supra; and *Booth v. Bank of England*, 6 Bing. N. C. 415; 1 Scott, N. R. 701. See also the provisions of 7 Geo. 4, c. 46; 7 & 8 Vict. c. 32, s. 26; 8 & 9 Vict. c. 76; 20 & 21 Vict. c. 49, s. 12.

(*i*) 7 Geo. 4, c. 46, s. 1.

(*k*) Page 44; even though the company's seal be affixed. *Dutton v. Marsh*, L. R., 6 Q. B. 361; 40 L. J. 175.

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And that they are liable at law not only to holders who are strangers, but to holders who may be also holders of letters of allotment, or holders of scrip (*l*).

If, however, having authority to bind the company by bills, the directors regularly accept, in the name of the company, a bill drawn on the company, every member of the company is liable as a joint acceptor to any holder, not being also a member of the company (*m*).

An authority, to make contracts and bargains, and to transact all matters requisite for the affairs of the company, will not in general authorize the directors to draw bills (*n*). But a limited authority to draw bills will receive a fair and reasonable construction (*o*).

Directors signing a *joint and several* note, though for themselves and the other shareholders, are personally responsible (*p*). But not necessarily so if the note be joint only (*q*). And it has been held, that if the secretary's name is countersigned *as secretary*, he also may be liable (*r*).

If a bill be drawn on several trustees or directors who have power to bind each other, an acceptance by one in his own name is the acceptance of all (*s*).

Notice of a fact to one member of a joint-stock company is not notice to all (*t*), as in the case of a private partnership.

A bill drawn on the agent of a joint-stock company, he being a member of it, and accepted by him per procuration for the company, binds him personally as a member (*u*).

(*l*) *Fox v. Frith*, 10 M. & W. 131.

(*m*) See *Teague v. Hubbard*, 8 B. & C. 345; 2 M. & R. 369; *Higgins v. Senior*, 8 M. & W. 834; *Fox v. Frith*, 10 M. & W. 131; *Steele v. Harmer*, 15 L. J., Exch. 217; 14 M. & W. 831; 19 L. J., Exch. 34; 4 Exch. 1; *MacLae v. Sutherland*, 3 E. & B. 1.

(*n*) See *Harmer v. Steele*, 19 L. J., Exch. 34; 4 Exch. 1; *Allen v. Sea Life Assurance Company*, 9 C. B. 574; *Halford v. Cameron Coal Company*, 20 L. J., Q. B. 160; 16 Q. B. 442; *Edwards v. Same*, 6 Exch. 269.

(*o*) *Thompson v. Wesleyan Newspaper Association*, 8 C. B. 849.

(*p*) *Healey v. Story*, 18 L. J., Exch. 8; 3 Exch. 3. See also *Penkirel v. Connell*, 19 L. J., Exch. 305; 5 Exch. 381.

(*q*) *Lindus v. Melrose*, 27 L. J., Exch. 326; 2 H. & N. 293; in error, 27 L. J., Exch. 328; 3 H. & N. 177. This was a decision on the stat. 19 & 20 Vict. c. 47, s. 43. See, however, *Dutton v. Marsh*, L. R., 6 Q. B. 361; 40 L. J. 175.

(*r*) *Bottomley v. Fisher*, 31 L. J., Exch. 417; 1 H. & Colt. 211. Code, s. 26 (1). In *Clamp's case*, 7 T. L. R. 131, if his signature had been held that of an indorser the defence of absence of notice of dishonour would have been available.

(*s*) *Jenkins v. Morris*, 16 M. & W. 877.

(*t*) *Powles v. Page*, 3 C. B. 31; *Steward v. Dunn*, 12 M. & W. 664; *In re Peru Railway Company*, L. R., 2 Chan. Ap. 617.

(*u*) *Nichols v. Diamond*, 9 Exch. 154.

The stat. 7 & 8 Vict. c. 110, s. 45 (since repealed), enacted that where the directors were authorized by deed of settlement or bye-law to issue or accept bills or notes, they should be made or accepted by two directors, and expressed to be made or accepted on behalf of the company, and countersigned by the secretary. That they might be indorsed in the name of the company by any officer authorized by deed or bye-law. That on instruments properly made the company might be sued, but the signing officers were not liable.

The liability of a company formed under this act could not be limited by the deed of settlement (*x*), and a proviso in a bill of exchange limiting the liability was repugnant and void (*y*).

On this statute it was held that an acceptance in this form, "A. and B., directors appointed by resolution to accept this bill," was an acceptance within the statute (*z*).

The registered deed, or, as it is now, memorandum, is notice of its contents to all who deal with the company (*a*).

The statute 25 & 26 Vict. c. 89, s. 47, amended by 30 & 31 Vict. c. 131, enacts, that bills and notes made, accepted or indorsed in the name of the company, by any person acting under the authority of the company, express or implied, shall bind the company (*b*).

But if any person on behalf of a *limited* company registered under the act signs or indorses a bill, cheque or note on which the name of the company is not duly mentioned, he is liable to a penalty of 50*l.*, and is moreover made personally responsible to the holder (*c*).

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Of companies completely registered under the 7 & 8 Vict. c. 110.

Deed notice to persons dealing with the company.

Of companies registered under the acts of 1862 and 1867.

(see next page)

(*x*) *Gordon v. Sea Fire Society*, 1 H. & N. 599; *Re Sea Fire and Life Society*, 3 De G., M. & G. 459. See also *Peddell v. Gwynn*, 1 H. & N. 500. A company formed under that Act may be re-registered under the later Acts.

(*y*) *Re State Fire Insurance Company*, 32 L. J., Chan. 300.

(*z*) *Halford v. Cameron Coal Company*, 20 L. J., Q. B. 160; 16 Q. B. 442; *Edwards v. Cameron Coal Company*, 6 Exch. 269.

(*a*) *Ridley v. Plymouth Company*, 2 Exch. 711; *Balfour v. Ernest*, 28 L. J., C. P. 170; 5 C. B., N. S. 601; *Royal British Bank v. Turquand*, 6 E. & B. 327; *Ashbury & Co. v. Riche*, 44

L. J., Ex. 185; L. R., 7 H. L. 653. An express provision in the memorandum of association as to accepting and drawing bills would probably confer the power, if otherwise doubtful. See *Palmer's Co. Prec.*, 7th Ed., Part. I. 306.

(*b*) *Lindus v. Melrose*, *supra*. As to what is a making in the name of the company, see further, *Aggs v. Nicholson*, 1 H. & N. 165.

(*c*) Sect. 42. *Atkins v. Wardle*, 58 L. J., Q. B. 377. *Nassau Steam Press v. Tyler*, 1894, 70 L. T. 376. By sect. 5 the company must be described as "limited." *Penrose v. Martyr*,

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Where two directors and the secretary of a company incorporated under local acts, without power to accept bills, accepted for the company in their own names a bill drawn on the company, they were held personally liable on the implied representation of authority (*d*).

By the 25 & 26 Vict. c. 89, s. 95, official liquidators appointed under that act have power, with the sanction of the Court (and now without 53 & 54 Vict. c. 63, s. 12), to draw, accept, make or indorse bills and notes in the name and on behalf of the company. By sect. 133, the same, or perhaps wider, powers are conferred on liquidators appointed under a voluntary winding-up. But one cannot accept on behalf of all, even under a resolution to that effect (*e*).

BILLS SIGNED
BY PERSONS
FILLING
OFFICIAL
SITUATIONS.

If persons who fill official situations as churchwardens, overseers, surveyors, commissioners, managers of joint-stock banks, agents and secretaries to companies, and the like, give bills or notes on which they describe themselves in their official capacity, they are nevertheless personally liable. Thus drafts on a banker, signed by commissioners under an inclosure act "*as commissioners*," bind the commissioners personally (*f*). So does a promissory note given by A. and B. as churchwardens and overseers (*g*).

Bills given to
them.

So it is conceived that the legal interest in a bill or note given to an officer by his name of office, vests in the person who happens to fill the office at the time. Thus, a note given to the manager of a joint-stock banking company vests at law in the person who fills that office when the

Though here the word 'did not appear on the bill' (it was wider than the stamp of the Co.) two Directors who had signed for the Co. were held not personally liable. *Dermatid Co. v. Ashworth*, 21 T. L. R. 810. *Chenash, J.* (1905) & that the Co. was 'mentioned' in it.

E., B. & E. 499; 28 L. J., Q. B. 28. But it seems he is not liable as acceptor of a bill drawn on the company. *Eastwood v. Bain*, 28 L. J., Ex. 74; 3 H. & N. 733. Quære, whether he might not be liable for a false representation. See *West London Bank v. Kitson*, 53 L. J., Q. B. 345; 12 Q. B. D. 157.

(*d*) *West London Bank v. Kitson*, supra. But a mere direction given by directors of a company to a bank how cheques should be drawn for the company does not impose on those directors any personal liability. *Beattie v. Lord Ebury*, L. R., 7 H. L. 102.

(*e*) See sub-section 6, and *Ex parte Birmingham Bank*, L. R., 3 Chan. Ap. 651, where the bill-

holders, however, were allowed to prove for money advanced. *Ex pte. Agra & Masterman Bank*, L. R., 6 Chan. Ap. 206, decided the same point as to renewed bills. See also *Bolognesi's case*, L. R., 5 Chan. Ap. 567.

(*f*) *Eaton v. Bell*, 5 B. & Ald. 34; *Nichols v. Diamond*, 9 Exch. 154; *Bottomley v. Fisher*, 1 H. & C. 211.

(*g*) *Rew v. Pettit*, 1 Ad. & E. 197; 3 Nev. & M. 456, nom. *Crew v. Petit*; *Price v. Taylor*, 29 L. J., Ex. 331; 5 H. & N. 540; and vide ante, p. 44. The personal liability of churchwardens and overseers is not transferred to their successors by the 11 & 12 Vict. c. 91. See *Chambers v. Jones*, 5 Exch. 229.

note is given (*h*). And where a note was made payable to the trustees acting under A.'s will, parol evidence was held admissible to show who they were and what the trusts were (*i*).

A bill or note payable at a certain time after date to the secretary or other officer *for the time being* of a company was formerly void, the payee being uncertain at the time of making, but now such a bill or note is valid (*k*).

The manager, as well as any other *bonâ fide* holder, may of course sue in his own name on any bills indorsed in blank belonging to a banking company (*l*).

(*h*) *Robertson v. Sheward*, 1 M. & Gran. 511; 1 Scott, N. R. 419.

(*i*) *Megginson v. Harper*, 4 Tyrwh. 96; 2 Cr. & M. 322; 39 R. R. 784.

(*k*) *Storm v. Stirling*, 3 E. & B. 832; *Yates v. Nash*, 29 L. J., C. P. 306; 8 C. B., N. S. 581. But a promissory note to the

trustees of a chapel or their treasurer *for the time being* was held good, for the trustees were held to be the payees and the treasurer merely an agent. *Holmes v. Jaques*, L. R., 1 Q. B. 376. See the Chapter on IRREGULAR INSTRUMENTS. Code, s. 7. (2)

(*l*) *Law v. Parnell*, 30 L. J. 17; 7 C. B., N. S. 282.

CHAPTER VI.
OF THE FORM OF BILLS OF EXCHANGE AND
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On what substance to be written. **BILLS** of exchange and promissory notes are usually, but it is apprehended not necessarily, written on paper. It is conceived that they might be written on parchment, linen, cloth, leather, or any other convenient substitute for paper, not being a metallic substance (a).

In what language. They may be written in any language, and in any form of words.

Bills or notes may be printed or written in pencil. A bill or note, or any other contract, may be printed or written, and in pencil, as well as in ink. "There is," says Abbott, C.J., "no authority for saying, that when the law requires a contract to be in writing, that writing must be

(a) See post, as to Metallic Tokens.

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in ink. There is not any great danger that our decision will induce individuals to adopt the mode of writing by pencil in preference to that in general use. The imperfection of this mode of writing, its liability to obliteration, and the impossibility of proving it when so obliterated, will prevent its being generally adopted" (b). Contracts written and signed in pencil are constantly admitted as written contracts at Nisi Prius (c), and testamentary writings in pencil often in the Ecclesiastical Courts (d).

The signature or indorsement of negotiable instruments may be by a mark (e).

Signature by
a mark.

It is proper, though not necessary, to superscribe the name of the place where a bill or note is drawn or made; but an instrument is not invalid by reason that it does not specify the place where it is drawn or made, nor where it is payable, Code, s. 8 (4), c.

Superscrip-
tion of the
place where
made.

Neither is a date in general essential to the validity of a bill or note; and if there be no date, it will be considered to be dated as of the time at which it was made, or rather issued (f); it may also be antedated, postdated, or dated on Sunday or presumably other non-business day (g).

Date.

(b) *Geary v. Physic*, 5 B. & C. 234; 7 Dow. & R. 653; 29 R. R. 225.

(c) *Jeffrey v. Walton*, 1 Stark. 267.

(d) *Rhymes v. Clarkson*, 1 Phil. 22; *Green v. Skipworth*, 1 Phil. 53; *Dickenson v. Dickenson*, 2 Phil. 173.

(e) *George v. Surrey*, 1 M. & M. 516; 35 R. R. 755. As to acceptance, see post, Chapter on ACCEPTANCE.

(f) At least if the bill reserve interest without more, the interest runs from the date of issue. Code, s. 9 (3); *De la Courtier v. Bellamy*, 2 Show. 422; *Hague v. French*, 3 B. & P. 173; *Giles v. Browne*, 6 M. & S. 73. Parol evidence has been held admissible to show from what time an undated instrument was intended to operate. *Davis v. Jones*, 25 L. J., C. P. 91; 17 C. B. 625. Under the old pleading, if it was stated to have been drawn on a particular day, but the declaration did not state the date

appearing on the bill, that was sufficient on a motion in arrest of judgment, or on demurrer. Ibid.

(g) Code, s. 13 (2); *Pasmore v. North*, 13 East, 517; 12 R. R. 420; *Austin v. Bunyard*, 27 L. J. 217; *Forster v. Mackworth*, L. R. 2 Ex. 163; 36 L. J. 94; *Emmanuel v. Roberts*, 9 B. & S. 121; *Bull v. O'Sullivan*, L. R. 6 Q. B. 209; 40 L. J. 141; *Gatty v. Fry*, L. R. 2 Ex. D. 265; followed in *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715; as to Sunday formerly, see *Begbie v. Leri*, 1 C. & J. 180. Under the old Acts a bill or note could not be postdated, so as in effect to make it payable at more than sixty days after issue and thus evade the higher duty. 55 Geo. 3 c. 184, s. 12; *Field v. Wood*, 6 Dowl. P. C. 23; 7 A. & E. 114; 2 N. & P. 117; *Serle v. Norton*, 9 M. & W. 309; unless drawn or made payable to order. Sect. 13; and *Emmanuel v. Roberts*, supra. Nor could an unstamped bill or note issued by a banker under

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insertion of.

When a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit; this must be done within a reasonable time, and in accordance with the authority, if any, express or implied, in order to charge prior parties (*h*). A holder in due course is in no case to be prejudiced by the insertion of a wrong or unauthorized date (*i*).

When a bill or note payable at a fixed period after date is issued undated, or when the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill or note will be payable accordingly; and should he by mistake in good faith insert a wrong date, the bill or note is not avoided, but will be good and payable as of that date (*k*).

The date expressed on a bill or note of the accepting, making, drawing, or indorsing, as the case may be, is *primâ facie* the true date, unless the contrary be proved (*l*).

Material
particular.

The date is a material particular of a bill or note, and any alteration of it, without the assent of all parties liable thereon, avoids the instrument, except as against the parties making or authorizing the alteration, or assenting thereto, and subsequent indorsers (*m*).

The usual allegation that a bill or note was made on a particular day is not matter of description, and the day need not be proved as laid (*n*). It would have been otherwise if the declaration went on to *describe* the instrument as bearing date on a particular day.

9 Geo. 4, c. 23, be postdated. All negotiable bills, notes and drafts for sums between 20s. and 5l. must formerly have been dated at or before issue. 17 Geo. 3, c. 30. Promissory notes payable to bearer on demand could not have printed dates. 55 Geo. 3, c. 184, s. 18.

(*h*) Code, s. 20 (1) and (2).

(*i*) Code, s. 12, prov. (2); 20, prov.

(*k*) Code, s. 12.

(*l*) Code, s. 13. *Anderson v. Weston*, 6 Bing. N. C. 296; 8 Scott, 893; *Taylor v. Kinloch*, 1 Stark. 175; *Obbard v. Betham*, 1 M. & M. 483; *Cowie v. Harris*, 1 M. & M. 141; 4 M. & P. 722;

Rose v. Rowcroft, 4 Camp. 245. This rule applies to written documents in general. *Sinclair v. Baggaley*, 4 M. & W. 312; *Davis v. Lowndes*, 7 Scott, N. R. 213; *Potez v. Glossop*, 2 Ex. 195; *Harrison v. Clifton*, 17 L. J., Ex. 233; *Butler v. Mountgarret*, 7 H. L. Ca. 647. *Aliter*, where an I O U was tendered by assignees of a bankrupt as evidence of a petitioning creditor's debt. *Wright v. Lainson*, 2 M. & W. 739; 6 Dowl. 146.

(*m*) Code, s. 64. See post, Chapter on ALTERATION.

(*n*) *Cuxon v. Lyon*, 2 Camp. 307, n.; *Smith v. Lord*, 14 L. J., Q. B. 112; 2 D. & L. 759.

Misdescription of the date of a bill in an agreement is immaterial if the bill were in existence and present. For "*præsentia corporis tollit errorem nominis*" (o).

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The time of payment is regularly and usually stated in the beginning of the note or bill ; but, if no time be expressed, the instrument will be payable on demand (p). Time of payment.

A bill or note must be payable either on demand, or else at a fixed or determinable future time. There is no limitation as to the length of time. "If a bill of exchange be made payable at never so distant day, if it be a day that must come, it is no objection to the bill" (q).

The time is fixed or determinable if the bill or note be payable at a fixed period after date or sight, or on, or at a fixed period after, the happening of a specified inevitable event ; but an instrument payable on a contingency is not a bill or note, and the happening of the event does not cure the defect (r).

The expression *after sight*, on a *bill of exchange*, means after acceptance, or protest for non-acceptance, and not after a mere private exhibition to the drawee, for the sight must appear in a legal way (s). But if a *note* is made after sight, the expression merely imports that payment is not to be demanded till it has been again exhibited to the maker (t) ; for a note being incapable of acceptance, the word "sight" must, on a note, bear a different meaning from the same word on a bill.

(o) *Way v. Hearne*, 32 L. J. 34.

(p) *Whitlock v. Underwood*, 3 Dowl. & R. 356 ; 2 B. & C. 157 ; *Down v. Halling*, 4 B. & C. 333 ; 6 Dowl. & R. 455 ; 2 C. & P. 11 ; Bayley, 5th ed. 109 ; and the words may be added without avoiding the instrument. *Aldous v. Cornwell*, L. R., 3 Q. B. 573 ; 37 L. J. 201. But on a motion to set aside an annuity, the Court will not assume that even a Bank of England note, or a draft on a banker, is payable on demand. See the cases collected in *Abbott v. Douglas*, 1 C. B. 491. Code, s. 10 (1).

(q) Per Willes, C.J., in *Colehan v. Cooke*, Willes, 396. Code, ss. 3, 11, and 89, "At sight" or "on presentation" are the same as on demand. Sect. 10.

(r) Code, s. 11. A bill or note

cannot therefore be drawn payable "after sight" simply ; it must specify the period after sight, at the end of which it is to become payable, in order to comply with the definition in s. 11, which by sect. 89 is extended to notes also.

(s) *Marius*, 19, cited by Lord Kenyon in *Campbell v. French*, 6 T. R. 212 ; 3 R. R. 154. So in America it has been held that *after sight* means after acceptance, and not after mere presentment. Byles on Bills, 6th American edition, p. 127.

(t) *Holmes v. Kerrison*, 2 Taunt. 323 ; 11 R. R. 594 ; *Sturdy v. Henderson*, 4 B. & Ald. 592 ; *Sutton v. Toomer*, 7 B. & C. 416 ; 1 M. & Ry. 125 ; *Dixon v. Nuttall*, 1 C., M. & R. 307 ; 6 C. & P. 320.

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Usance.

Foreign bills are sometimes drawn at one, two, or more usances, or, as it is sometimes expressed, at single, double, treble, or half usance. Usance signifies the usage of the countries between which bills are drawn with respect to the time of payment. If a foreign bill be drawn, payable at sight, or at a certain period after sight, the acceptor was formerly liable to pay according to the course of exchange at the time of acceptance, but now of payment, unless the drawer express that it is payable according to the course of exchange at the time it was drawn, *en espèces de ce jour* (*u*). Where half usance stands for half a month, it is fifteen days. And in the case of all bills payable in England, month means calendar month. Code, s. 14 (4).

The bill or note must be certainly payable at some time or other (*x*).

Request to
pay.

The order to pay need be in no particular form : any expression amounting to an order (*y*), or direction, is sufficient. The word "*pay*" itself is not indispensable. Any synonymous or equivalent expression will suffice, as "*Credit in Cash*" (*z*).

Description
of the payee
or indorsee.

Where a bill or note is not payable to bearer, the payee, or if it be specially indorsed the indorsee, should be named or otherwise indicated therein with reasonable certainty, so that he cannot be confounded with another person of the same name, and must be a person who is capable of being ascertained at the time the instrument is made (*a*). It is sufficient that the payee be so designated, though he be not named (*b*). But if the bill get into the hands of a

(*u*) Poth. 174. Code, 72 (4).

(*x*) Code, ss. 3 and 11. Vide post, IRREGULAR INSTRUMENTS.

(*y*) *Hamilton v. Spottiswood*, 4 Exch. 200. Beawes, 3 ; Marius, 11. In France, *il rous plaira payer*, is the common language of a bill. *Morris v. Lee*, 2 Ld. Raym. 1397 ; 1 Stra. 629. Quære, whether a mere written request, without any words of demand, amount to a bill. Lord Kenyon held this instrument to be a bill : — "Mr. Nelson will much oblige Mr. Webb, by paying to J. Ruff, or order, twenty guineas on his account." *Ruff v. Webb*, 1 Esp. 129 ; 5 R. R. 723. But Lord Tenterden held the following instrument not to be a bill :—"Mr. Little, please

to let the bearer have seven pounds, and place it to my account, and you will oblige your humble servant, R. SLACKFORD." *Little v. Slackford*, 1 M. & M. 171 ; 31 R. R. 726. "The paper," says his Lordship, "does not purport to be a demand made by a party having a right to call on the other to pay. The fair meaning is, 'you will oblige me by doing it.'" But see *Russell v. Powell*, 14 M. & W. 418.

(*z*) *Ellison v. Collingridge*, 9 C. B. 570.

(*a*) *Yates v. Nash*, 29 L. J., C. P. 306 ; 8 C. B., N. S. 581. Code, ss. 7 and 34.

(*b*) *Storm v. Stirling*, 3 E. & B. 832 ; *Cowie v. Stirling*, 6 E. & B. 333.

wrong payee, unless it be payable to bearer, he can neither acquire nor convey a title. One Christian drew a bill on the defendant, in London, payable to Henry Davis. The bill got into the hands of another Henry Davis than the one in whose favour it was drawn, was accepted by the defendant, and by the wrong Henry Davis was indorsed to the plaintiff. Held, that the indorsement of his own name by Henry Davis, was, under these circumstances a forgery, and (*dissentiente* Lord Kenyon) could convey no title to the plaintiff (*c*). If the name be spelt wrong, parol evidence is admissible to show who was intended (*d*). If there be father and son of the same name, it will be intended payable to the father till the contrary appear (*e*). But if the son be found in possession of the note, and he indorse, that is evidence that he, and not the father, is payee (*f*). A note payable to A., or to B. and C., or his or their order, was not a promissory note, within the Statute of Anne (*g*). A note in this form—"15*l*. 5*s*. balance due to A. C., I am still indebted, and do promise to pay" (*h*). Or in this—"Received of A. B. 100*l*., which I promise to pay on demand, with lawful interest," sufficiently designates the payee (*i*). A note payable "to the trustees acting under A.'s will" is a good note, and parol evidence is admissible to show who the trustees are, and what are the trusts (*k*). A note was made payable to the manager of the National Provincial Bank of England. To an action by the payee in his own name, the defendant pleaded that he did not make the note. Held, that under this plea the plaintiff was entitled to recover (*l*). "On demand I promise to pay J. W., T. S. and D. M., or to their order, or the major part of them, 100*l*." is a promissory note upon which the three persons mentioned can jointly maintain an action (*m*).

If a bill or note be made payable to a fictitious or non-existing person, it may be treated as payable to bearer (*n*). Fictitious payee.

(*c*) *Mead v. Young*, 4 T. R. 28; 2 R. R. 314.

(*d*) *Willis v. Barrett*, 2 Stark. 29.

(*e*) *Sweeting v. Fowler*, 1 Stark. 106; *Wilson v. Stubs*, Hobart, 330; see Bro. Ab. Addition, 18, 34, 43, 9 to 6; 13 Dyer, 5.

(*f*) *Stebbing v. Spicer*, 19 L. J., C. P. 24; 8 C. B. 827.

(*g*) *Blanckenhagen v. Blundell*, 2 B. & Ald. 417. See now Code, s. 7.

(*h*) *Chadwick v. Allen*, 2 Stra. 706.

(*i*) *Green v. Davies*, 4 B. & C. 235; 6 D. & R. 306; 28 R. R. 230.

(*k*) *Mcginson v. Harper*, 4 Tyr. 96; 2 C. & M. 322; 39 R. R. 784.

(*l*) *Robertson v. Sheward*, 1 M. & G. 511; 1 Scott, N. R. 419.

(*m*) *Watson v. Evans*, 32 L. J., Exch. 137; 1 Hurl & Colt. 662.

(*n*) Code, s. 7 (3).

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It was once held, that if the drawer indorsed a fictitious payee's name, the holder could not recover against the acceptor, unless his money had reached the acceptor's hands, in which case he could sue for money had and received, but that if the acceptor at the time of acceptance *knew* the payee to be a fictitious person, he could not take advantage of his own fraud; but a *bonâ fide* holder might recover against him on the bill, and declare on it as payable to bearer, or recover on the money counts (o). So the holder may recover against an acceptor for the honour of

(o) *Bennett v. Farnell*, 1 Camp. 130; *Minet v. Gibson*, 3 T. R. 481; 1 R. R. 754; judgment affirmed in Parliament, 1 H. Bl. 569; and see *Vere v. Lewis*, 3 T. R. 182; *Collis v. Emett*, 1 H. Bl. 313; *Tatlock v. Harris*, 3 T. R. 174. To *Bennett v. Farnell*, 1 Camp. 130, the learned reporter appends the following note:—"Almost all the modern cases upon this question arose out of the bankruptcy of Livesay & Co. and Gibson & Co., who negotiated bills, with fictitious names upon them, to the amount of nearly a million sterling a year. The first case was *Tatlock v. Harris*, 3 T. R. 174, in which the Court of K. B. held, that the *bonâ fide* holder for a valuable consideration of a bill drawn payable to a fictitious person, and indorsed in that name by the drawer, might recover the amount of it in an action against the acceptor, for money paid or money had and received, upon the idea that there was an appropriation of so much money to be paid to the person who should become the holder of the bill. In *Vere v. Lewis*, 3 T. R. 182, decided the same day, the Court held, there was no occasion to prove that the defendant had received any value for the bill, as the mere circumstance of his acceptance was sufficient evidence of this; and three of the Judges thought the plaintiff might recover on a count which stated that the bill was drawn payable to bearer. *Minet v. Gibson*, 3 T. R. 481; 1 R. R. 754,

where A obtains B to draw a cheque payable to C, A not intending that C shall receive it, C is not a fictitious person. *N. & S. Wales v. Macbeth*, (1908) 27 L. J. Q. B. 464.

put this point directly in issue, and the unanimous opinion of the Court was, that where the circumstance of the payee being a fictitious person is known to the acceptor, the bill is in effect payable to bearer. Soon after the Court of C. P. laid down the same doctrine in *Collis v. Emett*, 1 H. Bl. 313. This decision was acquiesced in; but *Minet v. Gibson* was carried up to the House of Lords, 1 H. Bl. 569. The opinion of the Judges being then taken, Eyre, C.B. (p. 618), and Heath, J. (p. 619), were for reversing the judgment of the Court below, and Lord Thurlow, C., coincided with them (p. 625), but the other judges thinking otherwise, judgment was affirmed. Parl. Cas. 8vo. ii. 48. In *Gibson v. Hunter*, 2 H. Bl. 187, 288, which came before the House of Peers upon a demurrer to evidence, it was held, that in an action on a bill of this sort against the acceptor to show that he was aware of the payee being fictitious, evidence was admissible of the circumstances under which he had accepted other bills payable to fictitious persons. *Vide Tuft's case*, Leach, Cro. Law, 159." *Phillips v. Im Thurm*, 18 C. B., N. S. 694. It is now immaterial whether the acceptor, or party sought to be charged, knew or not. *Vagliano v. Bank of England*, 1891, Ap. Cas. 107; 60 L. J. 145; *Clutton v. Attenboro*, [1897] Ap. Cas. 90; 66 L. J. 221.

See *Vinden v. Hughes* [1905] 1 K. B. 796.

the drawer where the payee is a fictitious person and treat the bill as payable to bearer (*p*).

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A bill not made payable to any payee in particular, or to the drawer's order, or to the bearer, was held by the majority of the judges, *dissentiente* Eyre, C. B., to be payable to bearer (*q*). And when a blank is left for the payee's name, a *bonâ fide* holder can fill in his own name, and recover against the drawer (*r*). But in order to charge the acceptor the holder must show that he had at least *primâ facie* an authority to insert his own name as payee (*s*). Until the omitted particular is filled in the instrument, apparently, will not comply with the definition in the Code, s. 3, so as to be a bill of exchange.

No payee.

Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill or note, it operates as a *primâ facie* authority to complete the bill or note up to any amount warranted by the stamp: and the signature may be used for maker or acceptor, drawer, or indorser (*t*). And in like manner when a bill or note is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit. But in order to

Blank signatures.

This applies to an indorser mult.
Q2enie v. Smith
[1908] 1 K.B. 263.

(*p*) *Phillips v. Im Thurm*, 18 C. B., N. S. 694; and see *Phillips v. Im Thurm*, L. R. 1 C. P. 463; 35 L. J. 220.

(*q*) *Minet v. Gibson*, 1 H. Bl. 608; 1 R. R. 754. *Dawn v. Vallentin*, 11 T. L. R. 211; and see Lord Esher's remarks in *Chamberlain v. Young*, *infra*, at p. 209. The omission may be filled up at the holder's pleasure. Code, s. 20; *Cruchley v. Mann*, 5 Taunt. 529; so long as he is acting *bonâ fide*. *Hogarth v. Latham*, *infra*.

(*r*) *Cruchley v. Clarence*, 2 M. & S. 90; 14 R. R. 596; *Attwood v. Griffin*, R. & M. 425; 2 C. & P. 368; 31 R. R. 669; Code, s. 20 (1). Where an acceptance in the name of a firm was given by one partner without authority, a blank being left for the drawer's name, a holder, who suspected the above facts, was held not entitled to fill in his own name as drawer and payee, and sue on the bill. *Hogarth v. Latham*, L. R., 3

Q. B. D. 643. In *R. v. Randall*, Russ. C. C. 185, a bill payable to —, or order, was held not to be a bill of exchange, because there was no payee; and see *R. v. Richards*, 1 R. & R. C. C. 193. A bill payable to "— order" was held payable to drawer's order in *Chamberlain v. Young*, [1893] 2 Q. B. 206.

(*s*) *Cruchley v. Mann*, 5 Taunt. 529; 1 Marsh. 29; *Aude v. Dixon*, 6 Ex. 869. Code, s. 20, gives such a *primâ facie* authority where the instrument has been delivered incomplete for that purpose. So a note payable to "Ship Fortune or bearer" is payable to bearer simply. *Grant v. Vaughan*, 3 Burr. 1516.

(*t*) *Russell v. Langstaffe*, 2 Doug. 514; Code, s. 20. The authority seems not confined to the person, to whom it is delivered, but to extend to any *bonâ fide* holder, as the words of the section are general.

(18) W. handed to A a blank paper (referred to as a promissory note) with instructions to fill it up as a promissory note payable to A. A filled it up as a promissory note to H. for \$30 & obtained on it H's cheque for \$25 made out to W. Held, the note had not been "negotiated" to H. *Hendman v. Wheeler* [1902] 1 K.B. 361. [Note: the position of estoppel seems not to have been argued. Div. Ct.]

Form of Bills and Notes.

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/ to show such an instrument has been negotiated (18)

Joint or alternative payees.

enforce it against prior parties, it must be filled up within a reasonable time, and strictly in accordance with the authority, if any, express or implied. But a holder in due course, is not to be prejudiced in any case by delay or disregard of authority (u).

A bill or note may not only be made to two or more payees jointly, but it may also be made payable in the alternative to one of two, or one or more of several; and as we have seen, may be made payable to the holder of an office for the time being (x).

A bill may be drawn payable to drawer, or his order, or payable to drawee or his order; but if the drawee be the same person as the drawer, or a fictitious person, or one incapable of contracting, the holder may treat the instrument either as a bill or note, at his option (y).

When negotiable.

All bills and notes are in their nature negotiable, unless they contain special words prohibiting transfer. Negotiable bills and notes continue to be so, until they have been either restrictively indorsed, or discharged by payment or otherwise (z).

Order or bearer.

Negotiable bills and notes may be payable either to order or to bearer, but these actual words need not be present.

A bill or note is payable to bearer, which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.

A bill or note is payable to order, which is expressed to be so payable, or is payable to a particular person, and does not contain words expressly or impliedly prohibiting transfer (a).

Accepted bills left with A to fill drawers & use for certain purposes. A handed them to B, for his own purposes, who inserted them in own name. Not protected (1901) *Walsh v. Lane* 85 L.T. 482 *Kennedy* J.

(u) Code, s. 20. An acceptor is estopped as to the existence of the payee where the bill is drawn payable to his order, and as to his capacity to indorse. Code, ss. 54 (2) c., and 88.

(x) Code, s. 7. Formerly there could not be alternative payees. *Blanchenhagen v. Blundell*, 2 B. & A. 417.

(y) Code, s. 5. See post, Chapter on IRREGULAR INSTRUMENTS.

(z) Code, ss. 8 and 36. At least until maturity, as the transferee of an instrument overdue does not acquire a new and

independent title; discharge by payment must be made by or on behalf of the acceptor or maker at maturity to the holder. Sect. 59. A bill paid before maturity is said to be "retired," and can generally be re-issued. See post, Chapter on TRANSFER, and *Ex parte Reid*, L. R. 14 Eq., p. 293. A bill or note may also be discharged by cancellation, wrongful alteration, waiver, or transfer to acceptor or maker on maturity in his own right.

(a) Code, s. 8. Formerly a bill or note was not negotiable unless it contained one or other of the

signed a blank paper (referred to as a promissory note) & handed it to C to fill up as a promissory note payable to C. for \$250. C fraudulently filled it up as a promissory note for \$1000 payable to C. & borrowed money of C on it. Held B was estopped from setting up limited authority. *Lloyd's Bank Ltd v. Cooke* [1907] 2 K.B. 735.

P. & W. T. ... [1907] 2 K.B. 735

Where a bill or note, either originally or by indorsement is payable to a man's order, and not to him or order, it is nevertheless payable to him or his order at his option (*b*).

A bill or note payable to order requires indorsement and delivery, if to bearer delivery only, in order to negotiate it.

The sum for which a bill is made payable is usually written in the body of the bill in words at length, the better to prevent alteration¹; and if there be any difference between the sum in the body and the sum superscribed, the sum mentioned in the body will be taken to be that for which the bill is made payable (*c*); when the figures express a larger sum than the words, evidence to show that the difference arose from an accidental omission of words, is inadmissible (*d*). An omission in the body may be aided by the superscription (*e*). Sum payable.

An inaccurate, but intelligible, statement of the sum payable will not vitiate. Thus, an order, or promise to pay so many "pound," instead of "pounds," is a good bill or note (*f*). A bill for "twenty-five, seventeen shillings and three" is a bill for 25*l.* 17*s.* 3*d.* (*g*). The word *sterling*

words "order" or "bearer." *Smith v. Kendall*, 6 T. R. 123; 1 Esp. 231; *R. v. Box*, 6 Taunt. 325; R. & R. 300. Since a bill or note payable to C. is payable to him or order, and if he indorse in blank, payable to bearer, it seems immaterial whether or not the actual words "order" or "bearer" be present in order to make a bill negotiable, provided there be none prohibiting transfer. No particular form of words (except for cheques) is given in the Code for drawing a bill so as not to be negotiable, but such a form is given to constitute a restrictive indorsement. Sect. 35. Formerly, if a payee indorsed a bill or note not bearing the word "order," he made himself, but not the original parties liable to the indorsee. *Hill v. Lewis*, 1 Salk. 133. Perhaps the effect of words prohibiting transfer would now have the same effect on a payee or indorsee who indorses notwithstanding; see s. 35.

(*b*) Code, s. 8 (5); but until he indorse, a bill to drawer's order

is not "complete and regular" as a negotiable instrument within s. 29. *Singer v. Elliott*, 4 T. L. R. 524; *Jenkins v. Comber*, [1898] 2 Q. B. 168; 67 L. J. 780. A bill drawn payable to the drawer's order, has been held payable to him or his order, both here and in America. *Smith v. M'Clure*, 5 East, 476; 2 Smith, 43; 7 R. R. 750; Byles on Bills, 6th Amer. edition, 132.

(*c*) *Marius*, 138; *Beawes*, 193; *Saunderson v. Piper*, 5 Bing. N. C. 425; 7 Scott, 408; Code, s. 9 (2). Figures in the margin have been held to be merely a memorandum, alteration of which does not avoid. *Garrard v. Lewis*, L. R., 10 Q. B. D. 30, as against a holder in due course.

(*d*) *Saunderson v. Piper*, 5 Bing. N. C. 425; 7 Scott, 408.

(*e*) *Elliot's case*, 2 East, P. C. 951; 1 Leach, 175.

(*f*) *R. v. Port*, Bayley, 12, 6th ed.

(*g*) *Phipps v. Tanner*, 5 C. & P. 488.

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means sterling in that part of the United Kingdom where the bill is payable (*h*).

As to foreign currency, see Chapter on FOREIGN LAW.

Former
restrictions as
to bills or
notes for
limited sums.

A bill or note, like a cheque, may now be drawn or made for any sum of money, large or small ; but this does not extend to bank notes, or promissory notes in England for less than 5*l.* payable to bearer on demand, as to which the 7 Geo. 4, c. 6, s. 3, and the 9 Geo. 4, c. 65, s. 1, are still in force (*i*).

Value
received.

There were some old cases tending to show that the words *value received* are an essential part of a bill (*k*), but it is now well settled that they are not at all material (*l*).

It was once doubted whether an action of *debt* would lie on a bill, unless the consideration were expressed (*m*). But it has been decided that debt would lie although the consideration were not expressed (*n*).

The words "*value received*" are ambiguous, where the bill is drawn payable to a third person ; for they may mean either value received, by the drawer, of the payee, or by the acceptor of the drawer. But the first is the more probable

(*h*) *Taylor v. Booth*, 1 C. & P. 286.

(*i*) Formerly all negotiable bills or notes for any sum under 20*s.* were made void by the 48 Geo. 3, c. 88, but that Act is repealed (saving existing rights) by the Code, s. 96 and sched. 2. Negotiable bills or notes for more than 20*s.* and less than 5*l.* (except cheques on bankers, 23 & 24 Vict. c. 111, s. 19, now repealed) were also void, unless they specified the name and abode of the payer were attested, bore date at or before issue, and were payable within twenty-one days, but not to bearer on demand ; neither could they be negotiated after date. 17 Geo. 3, c. 30. This Act was repealed by 3 Geo. 4, c. 70, but revived by 7 Geo. 4, c. 6. This latter Act exempted cheques, but sect. 3 imposes a penalty of 20*l.* on issuing a promissory note payable to bearer on demand for less than 5*l.* The 9 Geo. 4, c. 65, s. 1, prohibits the circulation of all negotiable bills or notes in England under 5*l.*, or

on which less than 5*l.* shall remain undischarged, payable to bearer on demand, made or purporting to be made in Scotland or Ireland, or elsewhere out of England. Sect. 4 again exempted drafts on bankers. The 17 Geo. 3, c. 30, after being again temporarily repealed by 26 & 27 Vict. c. 105, the operation of which was extended from time to time by various Acts down to 31st December, 1883 (see 46 & 47 Vict. c. 40), is at last finally repealed by the Code, s. 96 and sched. 2.

(*k*) *Cramlington v. Evans*, 1 Show, 5 ; Vin. Ab. Bills of Exch. G. 2.

(*l*) *White v. Ledwich*, Bayley, 40, 6th ed. ; 4 Doug. 427 ; *Grant v. Da Costa*, 3 M. & S. 351 ; and see *Popplewell v. Wilson*, 1 Stra. 264, and Code, s. 3 (4) b.

(*m*) *Bishop v. Young*, 2 B. & P. 78 ; *Priddy v. Henbry*, 3 D. & R. 165 ; 1 B. & C. 674.

(*n*) *Hatch v. Trays* ; *Watson v. Kightly*, 11 Ad. & E. 702 ; 3 Per. & Dav. 408.

interpretation ; for it is more natural " that the party who draws the bill should inform the drawee of a fact which he does not know, than of one of which he must be well aware " (o).

If, however, the bill is drawn payable to the drawer's own order, the words " value received " must mean received by the acceptor of the drawer ; and on such a bill, if the declaration stated that it was for value received by the drawer it would have been a variance (p). " *Value received*," in a note, means received by the maker of the payee (q).

Though the nature or particulars of the consideration may appear on the bill or note, it was not necessary to state it in the declaration, or it might be stated generally as value received (r). " The defendant," says Maule, J., " may prove that the note was given for a different consideration, or without any consideration at all " (s).

Other state-
ments of the
consideration.

But it has been held that the defendant will not be allowed to contradict his written admission on the note, of the nature of the consideration. Where a note was given by an administratrix, and expressed to be " for value received by my late husband," she was not allowed to show that the note was given only as an indemnity, and that the payee had not been damnified (t).

A bill may be accepted while incomplete, as before it has been signed by the drawer, Code, s. 18 ; but until the drawer's signature be added, a bill payable " to my order," though accepted, has been held to be of no force, either as a bill or a note (u).

Signature of
the drawer.

(o) Per Lord Ellenborough, in *Grant v. Da Costa*, 3 M. & S. 351.

(p) *Highmore v. Primrose*, 5 M. & S. 65.

(q) *Clayton v. Gosling*, 5 B. & C. 361 ; 8 D. & R. 110.

(r) *Coombs v. Ingram*, 4 D. & R. 211 ; *Bond v. Stockdale*, 7 D. & R. 140 ; Code, s. 3 (3).

(s) *Abbott v. Hendrich*, 1 M. & G. 796 ; 2 Scott, N. R. 183. Where the note on the face of it purported to be given for " value received in Pennance shares pursuant to annexed contract," it was held unnecessary to put in any contract. *Fox v. Frith*, Car. & M. 502.

(t) *Ridout v. Bristow*, 1 C. & J. 231 ; 1 Tyr. 84 ; 35 R. R. 710 ; and see *Edwards v. Jones*, 2 M. & W. 414 ; 5 Dowl. 585 ; 7 C. & P. 633.

(u) *McCall v. Taylor*, 34 L. J., C. P. 365. Until completed it is of no force. Code, s. 20. In *Carter v. White*, 20 Ch. D. 225, this was done after the acceptor's death. *Stoessiger v. S. E. Railway*, 3 E. & B. 553 ; *Goldsmid v. Hampton*, 5 C. B., N. S. 94 ; 27 L. J., C. P. 286. The drawer's signature as indorser will not remedy absence of his signature as drawer. *S. Wales Coal Co. v. Underwood*, 15 T. L. R. 157.

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The signature of the drawer or maker of a bill or note is usually subscribed in the right-hand corner; but it is sufficient if written in any other part. "Thus "I, J. S., promise to pay," has been held a sufficient signature of a promissory note (*x*). A man who cannot write may sign a bill by his mark (*y*).

An allegation in pleading that a party *made* his bill or note was sufficient, without alleging that he *signed* it, for *making* implies *signing* (*z*).

If a deed be first executed, and then written or filled up, the deed is void (*a*); but it is otherwise with a bill of exchange. For, if a stamped paper be signed, leaving blanks for the date, sum, time when payable, and name of the drawee, the drawer will be chargeable for any sum afterwards inserted within the amount warranted by the stamp. It is a letter of credit for an indefinite but not unlimited sum (*b*).

Direction to
the drawee.

A bill of exchange being in its original a letter, should be properly addressed to the drawee (*c*). But where a bill was made payable "at No. 1, Wilmot Street, opposite the Lamb, Bethnal Green, London," without mentioning the drawee's name, and the defendant accepted it, he was not allowed to make the objection (*d*). But a bill cannot be addressed to one man and accepted by another (*e*).

Alternative or
successive
drawees.

A bill may be addressed to two or more drawees, whether they be partners or not, but cannot be addressed to two or more in the alternative or in succession (*f*).

If the word *at* precede the drawee's name, whether inserted ignorantly or fraudulently, the instrument is still a bill of

(*x*) *Taylor v. Dobbins*, 1 Stra. 399; *Saunderson v. Jackson*, 2 B. & P. 238; 5 R. R. 580.

(*y*) *George v. Surry*, 1 M. & M. 516; 31 R. R. 755.

(*z*) *Elliott v. Cowper*, 1 Stra. 609; 2 Ld. Raym. 1376; 8 Mod. 307; *Erskine v. Murray*, 2 Ld. Raym. 1542; 1 Barn. 88.

(*a*) Com. Dig. Fait. (A.) 1.

(*b*) Code, s. 20; *Collis v. Emmett*, 1 H. Bl. 313; *Russell v. Langstaffe*, 2 Dougl. 514; *Snaith v. Mingay*, 1 M. & S. 87; *Leslie v. Hastings*, 1 M. & R. 119; *Molloy v. Delves*, 7 Bing. 428; 5 M. & P. 275; 4 C. & P. 492; *Barker v. Sterne*, 9 Exch. 684;

Garrard v. Lewis, L. R., 10 Q. B. D. 30; *Hogarth v. Latham*, L. R., 3 Q. B. D. 643.

(*c*) *Peto v. Reynolds*, 9 Exch. 410; 11 Exch. 418, in error.

(*d*) *Gray v. Milner*, 8 Taunt. 739; 3 Moore, 90; 21 R. R. 525.

(*e*) *Davis v. Clarke*, 13 L. J., Q. B. 305; 6 Q. B. 16; Code, ss. 6 and 17.

(*f*) Code, s. 6. Where, however, a bill addressed to A., or in his absence to B., was accepted by A., and the pleadings did not disclose the flaw, Lord Holt held the defendant liable. *Anon.*, 12 Mod. 447.

exchange (*g*). A bill may be directed to the drawer himself, though it is, in that case, rather a note than a bill (*h*).

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If the drawer intends that the bill shall be payable at a particular place, he may insert such a direction. Unless the words "only and not elsewhere" appear in the acceptance, the acceptance will be general, since 1 & 2 Geo. 4, c. 78, now repealed, so as to charge the *acceptor* (*i*). The drawer himself cannot be charged, unless the bill have been presented at the place where the drawer himself made it payable (*k*). This statute did not apply to promissory notes; and therefore, if any place of payment be mentioned in the body of a note, it is part of the contract. The place of payment must be described in the pleadings, and a presentment there is essential, in order to charge the maker or any other party (*l*). But, where the place of payment is merely stated in a memorandum at the foot or in the margin of the note, by way of direction, it need not be noticed in pleading, and presentment there, though it is sufficient (*m*), is not essential (*n*).

Of the place
where made
payable by
the drawer.

But where the whole note was printed (except the names, duties, and sum), and a place of payment was also printed at the bottom of the note, Lord Ellenborough held that a special presentment at this particular place was necessary (*o*). If the drawer of a bill makes it payable at his own house, that circumstance is evidence of its being an accommodation bill (*p*).

Notes of the branches of the Bank of England are payable at the Bank in London; but none of their notes

(*g*) *Shuttleworth v. Stephens*, 1 Camp. 407; *R. v. Hunter*, R. & R. C. C. 511; *Allan v. Mawson*, 4 Camp. 115.

(*h*) *Block v. Bell*, 1 M. & Rob. 149; *Starke v. Cheesman*, Carth. 509; *Dehors v. Harriot*, 1 Show. 163; *Robinson v. Bland*, 2 Burr. 1077; *Josselyn v. Lacier*, 10 Mod. 294; see *Davis v. Clarke*, 6 Q. B. 16; Byles on Bills, 6th American edition, p. 139; Code, s. 5.

(*i*) Code, s. 19; *Selby v. Eden*, 3 Bing. 611; 11 Moore, 511; *Fayle v. Bird*, 6 B. & C. 531; 9 Dowl. & R. 639.

(*k*) Code, s. 45 (4); *Gibb v. Mather*, in error, 8 Bing. 214; 1 M. & Scott, 387; 2 C. & J. 254; *Hodge v. Fillis*, 3 Camp. 463; *Bernstein v. Usher*, 11 T. L. R. 376.

(*l*) *Saunderson v. Bowes*, 14

East, 500; 13 R. R. 299; *Roche v. Campbell*, 3 Camp. 247; Code, s. 87 (1).

(*m*) *Fife v. Round*, 1861 (*qu.* reported).

(*n*) Code, s. 87 (3); *Price v. Mitchell*, 4 Camp. 200; 16 R. R. 775; *Eaton v. Russell*, 4 M. & S. 506; *Williams v. Waring*, 10 B. & C. 2; 5 M. & R. 9; 34 R. R. 306. But in *Hardy v. Woodroffe*, 2 Stark. 319; 20 R. R. 689; and in *Sproule v. Legg*, 3 Stark. 156, Lord Tenterden held that the note might be described as made payable at a place mentioned in the memorandum only.

(*o*) *Trecothick v. Edwin*, 1 Stark. 468.

(*p*) *Sharp v. Bailey*, 9 B. & C. 44; 4 M. & R. 4; 32 R. R. 567.

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are payable at a branch bank, unless specially made payable at such branch (*q*).

Direction to place to account.

The direction to place to account is unnecessary (*r*).

Words "as per advice."

A bill is sometimes directed to be paid "*as per advice* ;" sometimes "*without further advice* ;" sometimes "*with or without further advice* ;" and sometimes, and more commonly, without any of these words. In the first case, it is said the drawee is not justified in paying without further advice (*s*).

Stipulations by drawer or indorser.

The drawer of a bill and the indorser of a bill or note may vary his contract so as either to increase or diminish his liability to all parties, by an express stipulation inserted in the instrument. He may entirely negative his own liability, or confine it to certain cases, or on the other hand enlarge it by waiving some of the holder's duties, as, for instance, presentment, notice of dishonour, &c. (*t*).

(*q*) 3 & 4 Will. 4, c. 98, s. 6, which they must now be if issued there. Ibid., s. 4.

(*r*) *Laing v. Barclay*, 1 B. & C. 398 ; 2 D. & R. 530 ; 25 R. R. 430.

(*s*) Chitty, 162, 9th ed. But the order to pay must be unconditional (though it may be conditionally accepted), or it will not be a bill of exchange. Code, ss. 3 and 19.

(*t*) Code, ss. 16 and 21. *Phipson v. Kelner*, 4 Camp. 285 ; *Burgh v. Legge*, 5 M. & W. 418 ; *Brett v. Levet*, 13 East, 214. A parol agreement affecting the delivery may be good as between immediate parties or remote other than a holder in due course. Sect. 21 (2) b. To affect such a holder the special terms must appear on the bill. Code, s. 38 (2). *Pike v. Street*, 1 M. & M. 226, was not followed in *Abrey v. Crux*, L. R., 5 C. P. 37 ; but seems

to be in accordance with sect. 21 (2). "*Pike v. Street* has never been specifically overruled," per Grantham, J. ; *Henry v. Smith*, 39 Solicitors' Journal, 559 ; *Stagg Mantle & Co. v. Brodrick*, 12 T. L. R. 12 ; but parol agreements seem to be confined to what Rigby, L.J., in *New London Syndicate v. Neul*, [1898] 2 Q. B. 487, so happily calls cases of the "Escrow class." The Code has expressly required a writing for a waiver, s. 62. See Lindley, L.J., in *Edwards v. Walters*, [1896] 2 Ch. p. 166 at line 19. Hence it will be prudent to commit agreements even between immediate parties to writing. The common mode of indorsing so as to decline liability is by adding the words "*sans recours*" to the indorsement. As to a qualified acceptance, see post, Chapter on ACCEPTANCE.

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A NOTE cannot of course be made by a man to himself without more. Neither can it be made to himself and another man (a).

Note payable
to the maker.

But a note made payable to the maker's order becomes, in legal effect, when indorsed in blank, a note payable to bearer (b); and when specially indorsed, a note payable to the indorsee or order (c).

(a) See *Moffatt v. Van Millingen*, 2 B. & P. 124, n.; 5 R. R. 557; *Mainwaring v. Newman*, *ibid.* 120; 5 R. R. 554; and see *Teague v. Hubbard*, 8 B. & C. 345. It was formerly a doubt whether a note promising to pay to the maker's order, or to the maker or order, were a note within the statute. Such a note was sued on in *Richards v. Macey*, 14 M. & W. 484. It should on principle seem, when indorsed by the maker in blank, to be in legal effect a note payable to bearer. So decided by the Court of C. P. since these observations were written. *Browne v.*

De Winton, 17 L. J., C. P. 281; 6 C. B. 336. A bill of exchange drawn and accepted by the same parties is in strictness rather a promissory note, though capable of being treated as a bill. *Willans v. Ayers*, L. R., 3 Ap. Ca. 133.

(b) Code, s. 83 (2); *Browne v. De Winton*, 17 L. J., C. P. 280; 6 C. B. 336. So a bill payable to drawer's order is held not to be complete and regular on the face of it as a negotiable instrument till he indorse. *Singer v. Elliott*, 4 T. L. R. 524; *Jenkins v. Cumber*, 1898, 2 Q. B. 168; 67 L. J. 780.

(c) *Gay v. Lander*, 17 L. J., C. P. 287; 6 C. B. 336.

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instruments.

Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or incapable of contracting, or it should seem in general where an instrument is made in terms so ambiguous that it is doubtful whether it be a bill of exchange or a promissory note, the holder may treat it as either at his option (*d*).

Thus, where for goods sold and delivered the defendant gave the plaintiff an instrument in the following form :—

£44 : 11s. 5*d*.

London, 5th August, 1833.

Three months after date I promise to pay Mr. John Bury, or order, forty-four pounds eleven shillings and five pence, value received.

J. B. GRUTHEROT,
35, *Montague Place*,
Bedford Place.

JOHN BURY.

and Grutherot's name was written across the instrument as an acceptance, and Bury's name on the back as an indorsement, it was held that the plaintiff might treat the defendant Bury either as a drawer of a bill or maker of a note, and therefore was not bound to give him notice of dishonour (*e*).

So where an instrument was in the following form :—

21st October, 1804.

Two months after date pay to the order of John Jenkins, £78 : 11s., value received.

THOMAS STEPHENS.

At Messrs. JOHN MORSON & Co.

Lord Ellenborough held that it was properly a bill of exchange, but that perhaps it might have been treated as a promissory note, at the option of the holder (*f*).

(*d*) Code, s. 5 (2). *Peto v. Reynolds*, 9 Exch. 410; *Armfield v. Allport*, 27 L. J., Exch. 42; *Felder v. Marshall*, 30 L. J., C. P. 158; 9 C. B. (N. S.) 606; and a Court of law, in furtherance of justice and the intentions of the parties, will be astute to put such a construction upon it, *ut res magis valeat*. But still, if it be a mere inchoate instrument, it is (until completed) neither a bill of exchange nor a promissory

note. See *M'Cull v. Taylor*, 34 L. J., C. P. 365, and the preceding chapter.

(*e*) *Edis v. Bury*, 6 B. & C. 433; 9 D. & R. 492; 30 R. R. 389; see *Edwards v. Dick*, 4 B. & Ald. 212; 23 R. R. 255; *Block v. Bell*, 1 M. & Rob. 149; see *Dickenson v. Teague*, 4 Tyrwh. 450; 1 C., M. & R. 241; *Lloyd v. Oliver*, 18 Q. B. 471.

(*f*) *Shuttleworth v. Stephens*, 1 Camp. 407; *Allan v. Mawson*, 4 Camp. 115; *Gray v. Milner*, 8

A man may draw a bill on himself (*g*), and of that opinion were all the judges of the C. P. (*h*). Perhaps such a bill would be good where the drawer draws on himself *payable to his own order* (*i*); and a bill is sometimes drawn payable to the drawee's order. It is conceived that in the latter case, as well as the former, the instrument might, when accepted, be declared on as a promissory note of the drawee. But a bill payable to the drawee's order was formerly not a bill of exchange (*k*).

If a man draw a bill upon himself, it may be treated by the holder as a note (*l*). So may a bill drawn by a banking company in one place on the same banking company in another place (*m*).

An instrument which directs the drawee to pay *without acceptance*, is nevertheless a bill of exchange (*n*).

A note written by the creditor to his debtor at the foot of the creditor's account, requesting the debtor to pay that account to the creditor's agent, has been held not a bill of exchange, nor an order for the payment of money within the Stamp Act (*o*).

Bills and notes must be for payment of money only, and not for the payment of money and the performance of some other act. Therefore (*p*), a note to deliver up horses and a wharf, and pay money at a particular day, was held

Bills and notes must be for payment of a certain sum of money only.

Taunt. 739; 3 Moore, 90; 21 R. R. 525; *R. v. Hunter*, R. & R. C. C. 511; *Armfield v. Allport*, 27 L. J., Exch. 42.

(*g*) *Starke v. Cheesman*, Carthew, 508; *Dehors v. Harriot*, 1 Show. 163; *Robinson v. Bland*, 2 Burr. 1077.

(*h*) *Magor v. Hammond*, C. P. cited by Bayley, J., 9 B. & C. 364; and see *Roach v. Ostler*, 1 Man. & R. 120; Byles on Bills, 6th Amer. edition, p. 144.

(*i*) 1 Pardessus, 351.

(*k*) *R. v. Bartlett*, 2 M. & Rob. 362. See *Peto v. Reynolds*, 9 Exch. 410. See now Code, s. 5.

(*l*) *Roach v. Ostler*, 1 M. & R. 120.

(*m*) *Miller v. Thomson*, 3 M. & G. 576.

(*n*) *R. v. Kinneer*, 2 M. & Rob. 117; *Miller v. Thomson*, 3 M. & G. 576.

(*o*) *Norris v. Solomon*, 2 M. & Rob. 266. But in America it has been held that an indorsement

on a bond or promissory note ordering the contents to be paid to order is a good bill of exchange. Byles on Bills, 6th Amer. edition, p. 144.

(*p*) *Martin v. Chauntry*, 2 Stra. 1271; *Moore v. Vanlute*, B. N. P. 272, 5th ed.; *Follett v. Moore*, 19 L. J., Exch. 6; 4 Exch. 410. In this case a note, agreeing also to give real security, was held void as a note. But a note reciting that real security *had been given* is a good note, and required only a note stamp. *Fancourt v. Thorne*, 9 Q. B. 312. See ante, p. 13. An instrument in this form, "I promise to pay C. A. D. or bearer on demand the sum of 16*l.* at sight, by giving up clothes and papers, &c.," was held a good promissory note, it being considered that the latter words imported the consideration already received by the maker. *Dixon v. Nuttall*, 1 C. M. & R. 307; 6 C. & P. 320.

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no promissory note. Nor must a bill or note be in the alternative, as to pay a sum of money, or render A. B. to prison (*q*).

And for money in *specie*, or in legal currency.

And it must be for money in *specie* or legal currency ; therefore a promise to pay in three good East India bonds (*r*) is not a promissory note.

And for a sum certain.

And the sum must be certain, not susceptible of contingent or indefinite additions. Therefore, where an instrument promised to pay J. S. the sum of 65*l.* with lawful interest for the same, and all other sums which should be due to him, Lord Ellenborough held that it was not a promissory note, even for the sixty-five pounds (*s*). Nor must the sum payable be subject to indefinite or contingent deductions. Thus, where the defendant promised to pay 400*l.* to the representatives of J. S., first deducting thereout any interest or money J. S. might owe to the defendant, it was held no promissory note (*t*).

And for the payment of money.

And for the *payment* of money. Where the instrument contains a stipulation that the money or a portion of it shall be paid by a set-off, it is no promissory note (*u*).

Must not suspend payment on a condition.

"Pay to — against cheque" has no effect on negotiability of cheque. *Ex parte Scumble* 3 F. 1134.

A bill of exchange must be drawn unconditionally, though the acceptor may make his acceptance conditional, and the drawer and indorsers may qualify in any way they please their contingent liability, provided the payee or indorsee choose to take the bill under those terms ; so in a promissory note the promise must be to pay absolutely and at all events ; and payment must not depend upon a contingency ; for, as observed by Lord Kenyon (*x*), "It would

(*q*) *Smith v. Boheme*, Gilb. Ca. L. & E. 93 ; cited Lord Raym. 1396. Code, s. 17.

(*r*) Bull, N. P. 272. The same has been held of a promise to pay in cash or Bank of England notes. *Ex parte Imeon*, 2 Rose, 225. But since 3 & 4 Will. 4, c. 98, Bank of England notes have been a legal tender for sums over 5*l.* The present Tender Act, 33 & 34 Vict. c. 10, legalizes bank notes or gold to any amount, but limits silver to 40*s.* and copper, or as it is now bronze coinage, to 1*s.*

(*s*) *Smith v. Nightingale*, 2 Stark. 375 ; 20 R. R. 694 ; *Bolton*

v. Dugdale, 4 B. & Ad. 619 ; 1 N. & M. 412 ; 38 R. R. 326.

(*t*) *Smith v. Nightingale*, 2 Stark. 375 ; 20 R. R. 694 ; *Barlow v. Broadhurst*, 4 Moore, 471 ; and see *Leeds v. Lancashire*, 2 Camp. 205 ; *Bolton v. Dugdale*, 4 B. & Ad. 619 ; 1 N. & M. 412 ; 2 Bligh. 79 ; 38 R. R. 326 ; *Ayrey v. Fearnside*, 4 M. & W. 168.

(*u*) *Davies v. Wilkinson*, 10 A. & E. 98 ; 2 P. & D. 256.

(*x*) *Carlos v. Fancourt*, 5 T. R. 482 ; 2 R. R. 647. So a condition as to signing a special form of receipt may invalidate a cheque as such. *Barins v. London & S. W. Bank*, 15 T. L. R. 226.

perplex commercial transactions, if paper securities of this kind were issued into the world, encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire when these uncertain events would probably be reduced to a certainty." Besides, the recognition of conditional promissory notes would make a variety of conditional promises in writing valid, without evidence of consideration, and thus materially infringe on an established and very salutary rule of law (*y*). Thus, a note to this effect, "We promise to pay A. B. 116*l*. 11*s*. value received, on the death of George Henshaw, provided he leaves either of us sufficient to pay that said sum, or if we otherwise shall be able to pay it," is not a promissory note within the statute (*z*). So, a written engagement to pay a certain sum so many days after the defendant's marriage, is no promissory note, for, possibly, he never may marry (*a*). So, a paper, whereby the defendants promised to pay the plaintiffs, or order, the sum of 13*l*., for value received, with interest at 5*l*. per cent., "and all fines according to the rule," cannot be sued on as a promissory note (*b*). So, an order payable, "Provided the terms mentioned in certain letters, written by the drawer, were complied with," is no bill (*c*). So a note promising to pay, "On the sale or produce of the White Hart, St. Alban's, Herts, and the goods, &c., value received," is not a promissory note, though it be averred that, before action brought, the White Hart and the goods were sold (*d*). The following instrument was held not to be a note: "Borrowed and received of A. the sum of 200*l*. in three drafts, by B. dated as under, payable to us on C., which we promise to pay to the said A., with interest." The instrument then specified the drafts which fell due at a future day. Lord Ellenborough observed, "There can be no doubt that the money was not payable immediately, and that it was not to be paid at all, unless the drafts were honoured" (*e*). So, an order to pay at thirty days after

(*y*) See *Pearson v. Garrett*, 4 Mod. 242.

(*z*) *Roberts v. Peake*, 1 Burr. 323; *Leeds v. Lancashire*, 2 Camp. 205.

(*a*) *Beardsley v. Baldwin*, 2 Stra. 1151; and see *Pearson v. Garrett*, 4 Mod. 242; Comb. 227, which was before the statute 3 & 4 Anne, c. 9.

(*b*) *Ayrey v. Fearnside*, 4 M. & W. 168.

(*c*) *Kingston v. Long*, Bayley,

16, 6th ed.

(*d*) *Hill v. Halford*, 2 B. & P. 413; 5 R. R. 632.

(*e*) *Williamson v. Bennett*, 2 Camp. 417; and see *Clarke v. Perceval*, 2 B. & Ad. 660; *Shenton v. James*, 5 Q. B. 199; *Drury v. Macaulay*, 16 M. & W. 146; *Alexander v. Thomas*, 16 Q. B. 333; *Storm v. Stirling*, 3 E. & B. 832; *Cowie v. Stirling*, 6 E. & B. 333.

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the arrival of the ship *Paragon* at Calcutta, was held to be no bill of exchange (*f*). So, an order to pay "14*l.* 3*s.* out of the fifth payment, when it should be due, and should be allowed by J. S.," is no bill of exchange (*g*). But, "I promise to pay to J. S., or his order, at three months after date, as *per memorandum* of agreement," was held to be a promissory note, and that if the agreement made the promise conditional, the defendant ought to have shown it by setting it out in his plea (*h*).

An instrument in this form, "At twelve months I promise to pay A. B. 500*l.* to be held by them as collateral security for any monies now owing to them by J. M., which they may be unable to recover on realising the securities they now hold and others which may be placed in their hands by him," is no promissory note (*i*).

Period of payment may be uncertain if inevitable.

But it is not material that the time when the event may happen is uncertain, provided it must happen at some time or other; thus, a note payable on the death of A. B., or of the maker, is good (*k*). So, a note payable when a King's ship shall be paid off, has been held to be a good note, the Court of Error observing, "The paying off of the ship is a thing of a public nature" (*l*). But it is said (*m*), that the Court below assigned as a reason that the ship would certainly be paid off one time or other (*n*). The contingency, in order to vitiate the note as such, must be apparent on the face of the instrument (*o*). A promissory note payable with interest twelve months after notice, is not to be considered as payable on a contingency, and is, consequently, valid (*p*).

(*f*) *Palmer v. Pratt*, 2 Bing. 185; 27 R. R. 583; 9 Moo. 358; *Clarke v. Perceval*, 2 B. & Ad. 660; *Worley v. Harrison*, 5 Nev. & M. 173; 3 A. & E. 669.

(*g*) *Haydock v. Lynch*, 2 Ld. Raym. 1563.

(*h*) *Jury v. Baker*, E., B. & E. 459.

(*i*) *Robins v. May*, 11 A. & E. 214; 3 Per. & D. 147; 3 Jurist, 1188.

(*k*) *Cooke v. Colehan*, 2 Stra. 1217; *Roffey v. Greenwell*, 2 Per & Dav. 365; 10 A. & E. 222; Code, s. 11 (2).

(*l*) *Andrews v. Franklin*, 1 Stra. 24; *Erans v. Underwood*, 1 Wils. 262.

(*m*) And see *Haussoullier v.*

Hartsink, 7 T. R. 733; 4 R. R. 561; *Dixon v. Nuttall*, 6 C. & P. 320; 1 C., M. & R. 307; *Goss v. Nelson*, 1 Burr. 226. "I promise to pay or cause to be paid," is a good note, the alternative expression importing the same thing. *Lorell v. Hill*, 6 C. & P. 238.

(*n*) *Colehan v. Cooke*, Willes, 399; 1 Selw. N. P. 375. A note to an infant, payable when he shall come of age, has been held good, if it specify the particular day. *Goss v. Nelson*, 1 Burr. 226; 1 Ld. Kenyon, 498.

(*o*) *Richards v. Richards*, 2 B. & Ad. 447; 36 R. R. 619.

(*p*) *Clayton v. Gosling*, 5 B. & C. 360; 8 D. & R. 110.

The happening of the contingency on which the payment of the bill is dependent will not cure the defect (*q*).

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A note beginning, "I, A. B., promise, &c.," and signed A. B., or else C. D., is a good note against A. B., but only evidence *as against* C. D. of a conditional agreement to pay if A. B. does not (*r*).

Makers or payees liable or entitled in the alternative.

In this case the maker was uncertain ; the note, as such, was not available at all, if the payee were uncertain. Thus, where the maker promised to pay to A. or to B. and C. a certain sum, Abbott, C.J., said, "I have no doubt this instrument is not a promissory note within the statute of Anne ; for if a note is made payable to one or other of two persons, it is payable only on the contingency of its not having been paid to the other, and is not a good promissory note within the statute ;" but now there may be alternative payees (*s*). So a bill of exchange or promissory note payable after date to the secretary *for the time being* of a company was formerly void as a bill or note, but now such a bill or note is valid (*t*).

Upon the same principle the bill or note must not be made payable out of a particular fund (*u*), for the fund may prove insufficient. Plaintiff drew upon A., and required him to pay B. 7*l.* per month out of plaintiff's growing subsistence. This was held no bill of exchange, for, had plaintiff died, or his subsistence been taken away, the bill would not have been payable (*x*). So, an order from the owner of a ship to the charterer, to pay money on account of freight, is no bill ; for the future existence and amount of any debt due for freight are subject to a contingency (*y*). And the same rule holds if the contingency is expressed on the back of the note, by an indorsement made before the note was a perfect instrument (*z*).

Not to be made payable out of a particular fund.

(*q*) *Hill v. Halford*, 2 B. & P. 413 ; 5 R. R. 632 ; Code, s. 11 (2).

(*r*) *Ferris v. Bond*, 4 B. & Ald. 679 ; 23 R. R. 443 ; and see *Appleby v. Biddulph*, B. N. P. 272, cited *Morice v. Lee*, 8 Mod. 363 ; 4 Vin. Ab. 240, pl. 16 ; *Ex parte Yates*, 2 De G. & J. 191 ; Code, s. 56.

(*s*) *Blanckenhagen v. Blundell*, 2 B. & Ald. 417 ; Code, s. 7.

(*t*) Code, s. 7 : *Storm v. Stirling*, 3 E. & B. 832 ; *Cowie v. Stirling*, 6 E. & B. 333 ; *Yates v. Nash*, 8 C. B., N. S. 581 ; but see *Holmes v. Jaques*, ante, p. 87.

(*u*) *Jenny v. Herle*, 2 Ld. Raym. 1361 ; 8 Mod. 265 ; 1 Stra. 591 ; *Haydock v. Lynch*, 2 Ld. Raym. 1563 ; *Dawkes v. Lord de Lorraine*, 2 W. Bla. 782 ; 3 Wils. 207 ; *Yates v. Grove*, 1 Ves. jun. 280 ; *Carlos v. Fancourt*, 5 T. R. 482 ; 2 R. R. 647.

(*x*) *Josselyn v. Lacier*, 10 Mod. 294 ; Fort, 281 ; see *Russell v. Powell*, 14 M. & W. 418.

(*y*) *Banbury v. Lissett*, 2 Stra. 1211.

(*z*) *Leeds v. Lancashire*, 2 Camp. 205.

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But the statement of a particular fund in a bill of exchange will not vitiate it if introduced merely as a direction to the drawee how to reimburse himself or show the particular account to be debited; thus a bill directing the drawee to pay J. S. 9*l.* 10*s.*, "as my quarterly half-pay," was held to be a good bill (*a*).

Irregular bill
or note.

If the instrument be defective as a bill or note, it still may be evidence of an agreement (*b*).

Debentures,
policies,
coupons and
scrip.

Debentures have never been legally defined apparently, though a definition may be obtained from Chitty, L.J.'s, remarks in *Edmonds v. Blaina Furnaces Co.*, 36 Ch. D. 219; and *Levy v. Abercorris Slate Co.*, 37 Ch. D. 264; viz., a document creating or acknowledging a liability, and either expressing or importing an obligation to pay. His lordship further divides debentures into "secured" and "unsecured." Debentures, whether "secured" or not, are not promissory notes, and should, it seems, be stamped with a debenture stamp, and not with the *ad valorem* stamps of promissory notes (*c*). Policies of insurance are not promissory notes, the promise being only conditional (*d*). Coupons for interest, whether attached or not to the debentures, are not promissory notes, and require no stamp (*e*).

Scrip issued in England by the agent of a foreign government, by which the holder is to be entitled, on payment in full of the instalments due from him, to the delivery of definitive bonds, passes by mere delivery to a *bonâ fide* holder for value, such being the usage amongst bankers and dealers (*f*).

(*a*) *Macleod v. Snee*, 2 Str. 762; Code, s. 3 (3).

(*b*) By ss. 32 and 33 of Stamp Act, 1891, bills of exchange and promissory notes include any documents or writings (other than bank notes) containing a promise to pay out of a particular fund or on any condition, and such documents must be stamped in accordance with the Act; those in the form of bills of exchange with a fixed duty of one penny being deemed payable on demand, and those in the form of promissory notes in accordance with the scale. See post, Chapter on STAMP.

(*c*) *British India Steam Company v. Inland Revenue Commis-*

sioners, 7 Q. B. D. 165; 50 L. J. 517. Sched. tit. "Mortgage."

(*d*) *Mortgage Insurance Co. v. Commissioners of Inland Revenue*, 20 Q. B. D. 645; 21 Q. B. D. 352; 57 L. J. 630. Sched. tit. "Policy."

(*e*) *Enthoven v. Hoyle*, 13 C. B. 373; 21 L. J., C. P. 100. Sched. tit. "Bill of Exchange," Exemption 11.

(*f*) *Goodwin v. Roberts*, L. R., 10 Ex. 76; 1 Ap. Cas. 476; 45 L. J. 748; where a full history of the progressive development of negotiable qualities in instruments will be found in the judgment of the Lord Chief Justice. *Rumball v. Metropolitan Bank*, L. R., 2 Q. B. D. 194.

Bank Post Bills are bills issued by bankers (generally at seven days when issued by the Bank of England) for convenience in remitting small or odd sums of money. Being issued, accepted, they are practically equivalent to promissory notes (*g*).

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VII.

Bank Post
Bills.

Letters of credit and circular notes are methods of obtaining credit abroad, introduced for the convenience of travellers and agents, to obviate the trouble and risk of carrying about coin or bank notes.

Letters of
credit and
circular
notes.

They are now generally used together, in which case the letter of credit is called a letter of indication.

A letter of credit is an authority, or rather request, by a banker to his foreign correspondents therein named, to discount bills drawn on him by the bearer. Circular notes are the unsigned drafts, generally for some specific amount, given with the letter and to be used or not at the bearer's discretion. The banker usually indemnifies himself against the bills by anticipation, in which case the bearer may recover the balance of his deposit, if any, on surrendering the letter and unused notes (*h*).

It seems that the effect of such instrument is to place the issuer under a contract binding probably at law, but certainly so in equity (*i*), to pay even without acceptance (*k*) all bills drawn in conformity with the letter of credit (*l*); and the holders are not to be prejudiced by any set-off or cross claim by the drawee against the drawer (*m*).

Letters of credit to be used in England require a stamp (*n*), those to be used abroad none (*o*), though presumably the drafts when brought to England for payment or negotiation fell within the 17 & 18 Vict. c. 83, s. 5, and now within the 35th section of the present Act, and perhaps should be stamped in accordance with the *ad valorem* scale, if not on demand.

(*g*) *Forbes v. Marshall*, 24 L. J., Ex. 305; *Willis v. Bank of England*, 4 A. & E. 21. As title can only be made through the payee's indorsement, they offer more security against loss than Bank notes. It is said that no days of grace are allowed on them, but this must be more a matter of courtesy than of right. See Code, s. 14.

(*h*) But if any of the notes be lost it has been held that a satisfactory indemnity must be given, *Confians Company v. Parker*, L. R., 3 C. P. 1; the loss being

the customer's, *Hume Dick v. Farquhar & Co.*, 4 Times L. R. 541.

(*i*) *Agra and Masterman's Bank v. Asiatic Bank*, 36 L. J., Chanc. 222.

(*k*) Com. Dig. tit. Merch. F. 3.

(*l*) *Chartered Bank of India v. McFadyen*, 64 L. J., Q. B. 367.

(*m*) *Agra and Masterman's Bank*, supra.

(*n*) Sect. 32 Act of 1891.

(*o*) Sched. tit. "Bill of Exchange," Exemption 4. See, however, *Ex parte Boyse*, 33 Ch. D. 612; 56 L. J. 135.

CHAPTER VIII.
OF AGREEMENTS INTENDED TO CONTROL THE
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Various sorts
of agreements.

SUCH agreements are either WRITTEN OR ORAL.

A written agreement is either on the instrument itself or on a distinct paper. Again, a written agreement on the instrument itself is either contemporaneous with the completion of the bill or note, or it is a subsequent agreement. Once more, even a contemporaneous written agreement may either be parcel of the instrument, or it may be collateral.

Effect of con-
temporaneous
agreement
written on the
instrument.

A memorandum on a bill or note, made before it is complete, is sometimes considered as part of the instrument, so as to control its operation, and sometimes not.
If the memorandum make the payment contingent, we have seen that it will be incorporated in the instrument (a).

(a) *Leeds v. Lancashire*, 2 Camp. 205; *Hartley v. Wilkinson*, 4 M. & S. 25; 5 Camp. 127. Though by way of indorsement; *Leeds v. Lancashire*, supra. A joint and several promissory note had an indorsement in this form : "The within note is given for securing floating advances from the Lincoln and Lindsay Banking Company, to the within-named Thomas Smith, sen. (one of the joint and several makers of the note), with lawful interest for the same from the respective times when such advances have been or may be made, together with commission,

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But where it is merely directory, as if it point out the place of payment (*b*), or be merely the expression of an intended courtesy, as if it intimate a wish that the money lent should not be called in by the payee's executors till three years after his death (*c*); or if it import that a collateral security (as the deposit of title deeds) has been given (*d*); or be intended only to identify and ear-mark the instrument (*e*): it does not affect its operation. But a memorandum of the time when a note falls due may correct an error in the date (*f*).

A memorandum made after the note is perfected and delivered is an independent agreement, requiring an agreement stamp. "If," says Lord Ellenborough, "the memorandum was subsequently written, when the note had been perfected and delivered in its absolute state, it could not be considered as part of that instrument, though it chanced to be inscribed upon the same piece of paper. In that case it was an agreement by way of defeasance, and it lay upon the defendant to produce it with a proper stamp" (*g*).

Effect of an agreement subsequently written on the instrument.

A written agreement on a distinct paper, to renew, or in other respects to qualify, the liability of the maker or acceptor, is good as between the original parties (*h*). Thus, if the drawer agrees to indemnify the acceptor against a claim by other parties, for a portion of the sum for which the bill is drawn, and the acceptor afterwards pays those other parties a sum to which the indemnity applies, the acceptor's liability as between himself and the drawer, will be reduced *pro tanto*, and he will not be turned round to his cross action on the indemnity (*i*).

Effect of agreement written on a distinct paper.

stamps, postages, &c., and all usual charges and disbursements, not exceeding in the whole the sum of 100*l.* within mentioned." It was held to be an agreement which could not be read in evidence without an agreement stamp. *Sed quære*, whether the indorsement were anything more than an explanation of the consideration. *Cholmley v. Darley*, 14 M. & W. 344. See the Chapter on CONSIDERATION, and Code, 3 (*b*).

(*b*) *Exon v. Russell*, 4 M. & S. 505.

(*c*) *Stone v. Metcalfe*, 4 Camp. 217; 1 Stark. 53.

(*d*) *Wise v. Charlton*, 4 A. & E.

786; 6 Nev. & M. 364; 2 Har. & W. 49; *Fancourt v. Thorne*, 9 Q. B. 312.

(*e*) *Brill v. Crick*, 1 M. & W. 232.

(*f*) *Fitch v. Jones*, 5 E. & B. 238. And see *Fanshawe v. Peet*, 2 H. & N. 1.

(*g*) *Stone v. Metcalfe*, 4 Camp. 217; 1 Stark. 53; 54 & 55 Vict. c. 39, s. 4.

(*h*) *Bowerbank v. Monteiro*, 4 Taunt. 844; 14 R. R. 679; but it requires a good consideration to support it. *M'Manus v. Bark*, 5 L. R., Ex. 65; 39 L. J. 65.

(*i*) *Carr v. Stephens*, 9 B. & C. 758; 4 M. & R. 591.

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Agreement contemporaneous but collateral.

Promissory note accompanying a mortgage.

Effect of an oral agreement.

But a written agreement, though contemporaneous, will not restrain the operation of the bill or note if it be collateral, *e.g.*, if other persons besides the parties to the bill or note be parties to it (*k*).

When a promissory note is given to accompany a mortgage deed as further security, the mortgagee is not entitled to sever the two, and a court of equity would, if necessary, issue an injunction to restrain him from so doing (*l*).

No mere oral agreement can have any effect at law in controlling the instrument, if contemporaneous with the making of it; for that would be to allow oral evidence to vary a written contract (*m*). "Every bill or note," says Parke, J., "imports two things, value received, and an engagement to pay the amount on certain specified terms. Evidence is admissible to deny the receipt of value, but not to vary the engagement" (*n*).

(*k*) *Webb v. Spicer*, 19 L. J., Q. B. 34; 13 Q. B. 894; on error in Exchequer Chamber.

(*l*) *Walker v. Jones*, L. R., 1 Pr. C. 50, ante, p. 13.

(*m*) *Hoare v. Graham*, 3 Camp. 57; 13 R. R. 752; *Free v. Hawkins*, 8 Taunt. 92; 1 Moore, 28; *Woodbridge v. Spooner*, 3 B. & Al. 233; 1 Chit. 661; 22 R. R. 365, 367; *Moseley v. Hanford*, 10 B. & C. 729; *Foster v. Jolly*, 1 C., M. & R. 703; 5 Tyr. 255; *Richards v. Thomas*, 1 C., M. & R. 772; *Holt v. Miers*, 9 C. & P. 191; *Besant v. Cross*, 10 C. B. 895; *Stott v. Fairlamb*, 53 L. J., Q. B. 47.

(*n*) *Abbott v. Hendricks*, 1 M. & G. 795; *Moseley v. Hanford*, 10 B. & C. 729. "The cases," says Maule, J., "show that although a consideration is stated in the note, you may show that it was given for a different consideration or without any consideration at all." *Abbott v. Hendricks*, 1 M. & G. 791; 2 Scott, N. R. 183; but see *Ridout v. Bristow*, 1 C. & J. 231; 1 Tyr. 84; 35 R. R. 710; and *Edwards v. Jones*, 2 M. & W. 414; 5 Dowl. 585; 7 C. & P. 633.

In *Pike v. Street*, 1 Dans. & Lloyd, 159; 1 M. & M. 226, it

was held a good defence to an action against the drawer that, at the time when the plaintiff discounted the bill, he verbally agreed, in the event of its being dishonoured, not to proceed against the drawer, who had indorsed the bill to him. In *Abrey v. Cruz*, the contrary was held by the Court of C. P., *dubitante* that most eminent judge, the late Mr. Justice Willes, L. R., 5 C. P. 37; 39 L. J. 9.

An indorsement was perhaps excepted from the rule in the text on account of its twofold operation, as an express assignment to the indorsee of the right against the acceptor, and as implying a conditional promise by the indorser to pay on his default. This conditional promise might be varied by parol so as to increase the indorser's liability. *Phipson v. Kelner*, 4 Camp. 285; *Burgh v. Legge*, 5 M. & W. 418; *Brett v. Lerett*, 13 East, 214. It might, therefore, by analogy well be varied so as to diminish it. Byles on Bills, 6th Amer. edition 157. But see *Martin v. Cole*, 14 Otto, 30; *Kealing v. Van Sickle*, 39 Amer. R. 101; *Stack v. Buck*, *ib.* 113.

By sect. 16 a drawer or indorser

An instrument under seal may be delivered as an escrow, that is to say, with a condition that it shall not operate as a deed, except in a certain event. An instrument under seal, which is to operate as an escrow, must be delivered, not to the obligee, but to a stranger, and regularly the condition should be expressed by apt words used at the time of the delivery (*o*).

In analogy with a deed, it has been held that a written and signed simple contract may be delivered with an express parol condition precedent, that it is not to take effect except in a certain event. And the instrument may be so delivered, not only to a stranger, but by one party to the other (*p*). And evidence of the parol condition is admissible not only when it is relied on as a condition, but also when an action is brought upon it as an agreement (*q*).

When such a doctrine is extended to a bill of exchange or promissory note, it is obvious that it must not be applied to the injury of a holder for value without notice.

An agreement to renew, without more, is an agreement to renew once only (*r*). But the party liable is not bound to apply during the currency of the bill; he may do so within a reasonable time after the bill falls due (*s*).

may limit his liability to all parties, or increase it, by express stipulation on the bill or note, and will be held like an acceptor or maker to his written contract.

Still, as between immediate parties, or remote, other than a holder in due course, the delivery required to complete any contract on a bill or note, may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the bill or note. Code, s. 21. In *Henry v. Smith*, 39 Solicitors' Jo., 559, Grantham, J., points out that *Pike v. Street*, though much criticized, has never been formally overruled, and the effect of the most recent case, *New London Syndicate v. Neal*, [1898] 2 Q. B. 487; seems to be to confine parol agreements between immediate parties to what Rigby, L.J., styles cases of the escrow class.

(*o*) Sheppard's Touchstone, 58; see *Murray v. Earl of Stair*, 2 B. & C. 82; 26 R. R. 282, where the

Court of King's Bench expressed an opinion that it was not indispensable that express words should be used at the time, but that the condition might be gathered from circumstances.

(*p*) Code, s. 21 (2) b. *Daris v. Jones*, 17 C. B. 625; *Pym v. Campbell*, 6 E. & B. 370; *Wallis v. Littell*, C. B., M. T. 1861; 31 L. J., C. P. 101; *Lara v. Haron*, E. T., C. P. 1863; *Rogers v. Hadley*, 32 L. J., Ex. 241. In this last case parol evidence was held admissible to show that a contract signed and delivered was never intended to be the real contract between the parties.

(*q*) *Hindley v. Lucey*, 34 L. J., C. P. 7.

(*r*) *Innes v. Munro*, 1 Exch. 473. See, as to an agreement to renew being used as a defence to an action, *Flight v. Gray*, 3 C. B., N. S. 320; *Webb v. Spicer*, 13 Q. B. 886, 894; *Salmon v. Webb*, 3 H. L. Cas. 510. The point did not arise in *Innes v. Munro*.

(*s*) *Maillard v. Page*, L. R., 5

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Delivery in
the nature of
an escrow.

Chapman. Sample v. Kyle (1902) 4 F. 421.

Agreement to
renew.

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VIII.

Agreement on
bill must be
read.
Pleading.

A defendant has a right at the trial to call on the plaintiff to read any indorsements that may be on the bill (*t*).

Though it be necessary that the agreement affecting the operation of the bill or note should be in writing, it is not necessary in pleading to aver that it is in writing (*u*).

Ex. 312. A substituted bill is in general held under the same rights and title as the one it replaces. *Lee v. Zagury*, 8 Taunt. 114 ; 19 R. R. 476.

(*t*) *Richards v. Frankum*, 9 C. & P. 221. As to agreements by clerks in fraud of their employers,

see *Bosanquet v. Foster*, 9 C. & P. 659 ; *Bosanquet v. Corser*, 9 C. & P. 664.

(*u*) *Kearns v. Durell*, 18 L. J., C. P. 28 ; 6 C. B. 596. See *Gilbert v. Whitmarsh*, 8 Q. B. 969 ; *Austin v. Young*, L. R., 4 C. P. 553.

CHAPTER IX. OF THE STAMP.

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CHAPTER IX.

BILLS and notes were exempt from stamp duty till 22 Geo. 3, c. 33. This act was repealed and followed by several others containing some regulations still in force, though the duties were in many cases altered by the last general Stamp Act, 55 Geo. 3, c. 184. The duties imposed by this act were for the most part again altered by the 16 & 17 Vict. c. 59, and the 17 & 18 Vict. c. 83, which first introduced the use of adhesive stamps.

When stamps were first imposed on bills and notes.

The Stamp Act of 1891, 54 & 55 Vict. c. 39 (a), came into operation on the first day of January, 1892, and is the act now in force.

The present act.

The following are the provisions contained in the act and

(a) Followed by the 56 Vict. c. 7; 57 & 58 Vict. c. 30; the 58 Vict. c. 16; and the 60 & 61 Vict. c. 10. In the Schedule to the Inland Revenue Repeal Act,

33 & 34 Vict. c. 99, will be found such sections of former statutes as are, or were till recently, still in force. The Code does not affect the Stamp Acts, s. 97.

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schedule thereto, which relate to bills of exchange and promissory notes :—

All duties to be paid according to regulations of act.

2. All stamp duties for the time being chargeable by law upon any instruments are to be paid and denoted according to the regulations in this act contained, and except where express provision is made to the contrary are to be denoted by impressed stamps only (*b*).

How instruments are to be written and stamped.

3.—(1.) Every instrument written upon stamped material is to be written in such manner, and every instrument partly or wholly written before being stamped is to be so stamped, that the stamp may appear on the face of the instrument, and cannot be used for or applied to any other instrument written upon the same piece of material.

(2.) If more than one instrument be written upon the same piece of material, every one of the instruments is to be separately and distinctly stamped with the duty with which it is chargeable.

Instruments to be separately charged with duty in certain cases.

4. Except where express provision to the contrary is made by this or any other act,—

(*a*.) An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters ;

(*b*.) An instrument made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations.

Mode of calculating *ad valorem* duty in certain cases.

6.—(1.) Where an instrument is chargeable with *ad valorem* duty in respect of—

(*a*.) any money in any foreign or colonial currency, or

(*b*.) any stock or marketable security,

the duty shall be calculated on the value, on the day of the date of the instrument, of the money in British currency according to the current rate of exchange, or of the stock or security according to the average price thereof.

(2.) Where an instrument contains a statement of current rate of exchange, or average price, as the case may

(*b*) The use of adhesive stamps is permissible in the case of Bills of Exchange, payable on demand (which includes cheques, &c.,

s. 32), and is obligatory in the case of bills or notes drawn or made out of the United Kingdom. Sect. 34.

require, and is stamped in accordance with that statement, it is, so far as regards the subject matter of the statement, to be deemed duly stamped, unless or until it is shown that the statement is untrue, and that the instrument is in fact insufficiently stamped.

Use of Adhesive Stamps.

7. Any stamp duties of an amount not exceeding two shillings and sixpence upon instruments which are permitted by law to be denoted by adhesive stamps not appropriated by any word or words on the face of them to any particular description of instrument, and any postage duties of the like amount, may be denoted by the same adhesive stamps.

Certain adhesive stamps to be applicable to instruments and postal purposes.

8.—(1.) An instrument, the duty upon which is required or permitted by law to be denoted by an adhesive stamp, is not to be deemed duly stamped with an adhesive stamp, unless the person required by law to cancel the adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, or otherwise effectively cancels the stamp and renders the same incapable of being used for any other instrument, or for any postal purpose, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time (c).

General direction as to the cancellation of adhesive stamps.

(2.) Where two or more adhesive stamps are used to denote the stamp duty upon an instrument, each or every stamp is to be cancelled in the manner aforesaid.

(3.) Every person who, being required by law to cancel an adhesive stamp, neglects or refuses duly and effectually to do so in the manner aforesaid, shall incur a fine of ten pounds.

Appropriated Stamps and Denoting Stamps.

10.—(1.) A stamp which by any word or words on the face of it is appropriated to any particular description of instrument is not to be used, or, if used, is not to be available, for an instrument of any other description.

Appropriated stamps.

(2.) An instrument falling under the particular description to which any stamp is so appropriated as aforesaid is not to be deemed duly stamped, unless it is stamped with the stamp so appropriated.

(The penny stamps on Bills on demand (such as cheques, &c.) are not "appropriated stamps." All others are; and there is a special stamp appropriated on its face to Foreign bills.)

(c) See *Pooley v. Brown*, 31 L. J. C. P. 134, for the consequences of not cancelling.

CHAPTER
IX.*Production of Instruments in Evidence.*

Terms upon which instruments not duly stamped may be received in evidence.

14.—(1.) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds.

(4.) Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

Stamping of Instruments after Execution.

Penalty upon stamping instruments after execution.

15.—(1.) Save where other express provision is in this act made, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty, where the unpaid duty exceeds ten pounds, of interest on such duty, at the rate of five pounds per centum per annum, from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty.

Agreements.

Duty may be denoted by adhesive stamp.

22. The duty of sixpence upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed.

Certain mortgages of stock to be chargeable as agreements.

23.—(1.) Every instrument under hand only (not being a promissory note or bill of exchange) given upon the occasion of the deposit of any share warrant or stock certificate to bearer, or foreign or colonial share certificate, or any security for money transferable by delivery, by way of security for any loan, shall be deemed to be an agreement, and shall be charged with duty accordingly.

(2.) Every instrument under hand only (not being a

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promissory note or bill of exchange) making redeemable or qualifying a duly stamped transfer, intended as a security, of any registered stock or marketable security, shall be deemed to be an agreement, and shall be charged with duty accordingly.

(3.) A release or discharge of any such instrument shall not be chargeable with any *ad valorem* duty.

Bank Notes, Bills of Exchange, and Promissory Notes.

29. For the purposes of this act the expression "banker" means any person carrying on the business of banking in the United Kingdom, and the expression "Bank note" includes—

Meaning of
banker and
bank note.

(a.) Any bill of exchange or promissory note issued by any banker, other than the Bank of England, for the payment of money not exceeding one hundred pounds to the bearer on demand ; and

(b.) Any bill of exchange or promissory note so issued which entitles or is intended to entitle the bearer or holder thereof, without indorsement or without any further or other indorsement than may be thereon at the time of the issuing thereof, to the payment of money not exceeding one hundred pounds on demand, whether the same be so expressed or not and in whatever form, and by whomsoever the bill or note is drawn or made.

30. A bank note issued duly stamped, or issued unstamped by a banker duly licensed or otherwise authorized to issue unstamped bank notes, may be from time to time re-issued without being liable to any stamp duty by reason of the re-issuing.

Bank notes
may be
re-issued.

31.—(1.) If any banker, not being duly licensed or otherwise authorized to issue unstamped bank notes, issues, or permits to be issued, any bank note not being duly stamped, he shall incur a fine of fifty pounds.

Penalties for
issuing or
receiving an
unstamped
bank note.

(2.) If any person receives or takes in payment or as a security any bank note issued unstamped contrary to law, knowing the same to have been so issued, he shall incur a fine of twenty pounds.

32. For the purposes of this act the expression "bill of exchange" includes draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon

Meaning of
"bill of
exchange."

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any other person for, any sum of money ; and the expression "bill of exchange payable on demand" includes—

- (a.) An order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen ; and (d)
- (b.) An order for the payment of any sum of money weekly, monthly, or at any other stated periods, and also an order for the payment by any person at any time after the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf.

Meaning of
"promissory
note."

33.—(1.) For the purposes of this act the expression "promissory note" includes any document or writing (except a bank note) containing a promise to pay any sum of money.

(2.) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money (e).

(d) See *Firbank v. Bell*, 1 B. & Ald. 39. When such an order bearing an agreement stamp was held inadmissible under the then law for want of a Bill stamp, *Batts v. Swan*, 2 B. & B. 78 ; 4 Moore, 484. But unless a definite sum was specified, a bill stamp was not required. *Jones v. Simpson*, 2 B. & C. 318 ; 3 D. & R. 545 ; 26 R. R. 371 ; *Barlow v. Broadhurst*, 4 Moore 471 ; *Crowfoot v. Gurney*, 9 Bing. 372 ; 35 R. R. 557 ; *Hutchinson v. Heyworth*, 1 P. & D. 266 ; 9 A. & E. 375 ; *Norris v. Solomon*, 2 M. & R. 266 ; *Diplock v. Hammond*, 23 L. J. Ch. 550 ; 5 De G. M. & G. 320. A letter from one company to another in these terms, "We shall be obliged by your paying

Mr. J. Shellard the sum of 200*l.* out of monies payable to us, &c.," given to Shellard to present, was held inadmissible for want of a stamp. *Ex parte Shellard*, L. R. 17 Eq. 109 ; but this case was unfavourably reviewed in *Buck v. Robson*, L. R. 3 Q. B. D. 686, when a letter written to the debtor by the creditor in these terms, "I hereby assign the sum of 40*l.* now due or to be due in respect," was held not to be an order for the payment of money within s. 48 of the Stamp Act of 1870, but an assignment of a debt.

(e) A promise to indemnify in case of default in payment of a note is not a promissory note, *Dickinson v. Bower*, 14 T. L. R. 146. The sum of money must

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34.—(1.) The fixed duty of one penny on a bill of exchange payable on demand or at sight or on presentation may be denoted by an adhesive stamp, which, where the bill is drawn in the United Kingdom, is to be cancelled by the person by whom the bill is signed before he delivers it out of his hands, custody, or power.

Provisions
for use of
adhesive
stamps on
bills and
notes.

(2.) The *ad valorem* duties upon bills of exchange and promissory notes drawn or made out of the United Kingdom are to be denoted by adhesive stamps.

35.—(1.) Every person into whose hands any bill of exchange or promissory note drawn or made out of the United Kingdom, comes in the United Kingdom before it is stamped shall, before he presents for payment, or indorses, transfers, or in any manner negotiates, or pays the bill or note, affix thereto a proper adhesive stamp or proper adhesive stamps of sufficient amount, and cancel every stamp so affixed thereto.

Provisions as
to stamping
foreign bills
and notes.

(2.) Provided as follows :

(a.) If at the time when any such bill or note comes into the hands of any *bonâ fide* holder there is affixed thereto an adhesive stamp effectually cancelled, the stamp shall, so far as relates to the holder, be deemed to be duly cancelled, although it may not appear to have been affixed or cancelled by the proper person ;

(b.) If at the time when any such bill or note comes into the hands of any *bonâ fide* holder there is affixed thereto an adhesive stamp not duly cancelled, it shall be competent for the holder to cancel the stamp as if he were the person by whom it was affixed, and upon his so doing the bill or note shall be deemed duly stamped, and as valid and available as if the stamp had been cancelled by the person by whom it was affixed (*f*).

(3.) But neither of the foregoing provisoes is to relieve any person from any fine or penalty incurred by him for not cancelling an adhesive stamp.

be definite, and the promise to pay substantially the whole of the instrument. *Mortgage Insurance Co. v. Commissioners of Inland Revenue*, L. R. 21 Q. B. D. 352 ; 57 L. J. 630 ; *Yeo v. Dawe*, 53 L. T. 125 ; *Brown, Shipley & Co. v. Commissioners of Inland Revenue*, [1895] 2 Q. B. 598. As to a pledge contained in a promissory note, see p. 13, ante. Bills

issued by any county council or municipal corporation at not more than twelve months, though charged on property funds or rates are to be stamped as promissory notes and not as "marketable securities." 60 & 61 Vict. c. 24, s. 8.

(*f*) Even subsequently. *Marc v. Rouy*, 31 L. T. 372.

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IX.

As to bills
and notes
purporting
to be drawn
abroad.

Terms upon
which bills
and notes may
be stamped
after execu-
tion.

Penalty for
issuing, &c.
any un-
stamped bill
or note.

36. A bill of exchange or promissory note which purports to be drawn or made out of the United Kingdom is, for the purpose of determining the mode in which the stamp duty thereon is to be denoted, to be deemed to have been so drawn or made, although it may in fact have been drawn or made within the United Kingdom.

37.—(1) Where a bill of exchange or promissory note has been written on material bearing an impressed stamp of sufficient amount but of improper denomination, it may be stamped with the proper stamp on payment of the duty, and a penalty of forty shillings if the bill or note be not then payable according to its tenor, or of ten pounds if the same be so payable.

(2.) Except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof (*g*).

38.—(1). Every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped shall incur a fine of ten pounds, and the person who takes or receives from any other person any such bill or note either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever.

(2.) Provided that if any bill of exchange payable on demand or at sight or on presentation, is presented for payment unstamped, the person to whom it is presented may affix thereto an adhesive stamp of one penny, and cancel the same, as if he had been the drawer of the bill, and may thereupon pay the sum in the bill mentioned, and charge the duty in account against the person by whom the bill was drawn, or deduct the duty from the said sum, and the bill is, so far as respects the duty, to be deemed valid and available.

(3.) But the foregoing proviso is not to relieve any person from any fine or penalty incurred by him in relation to such bill (*h*).

(*g*) There are thus three cases in which a bill or note may be stamped after execution; viz.—when it is, or purports to be, drawn or made abroad; when it bears an impressed stamp of right value, but wrong denomination; and in the case of a bill of exchange on demand (which

include cheques), it is competent for the drawee to affix the stamp. Query if indorsee or bearer can do so, *Hobbs v. Cathie*, 6 T. L. R. 292.

(*h*) It is not necessary that the instrument should be stamped before it is presented for acceptance, *Sharpley v. Rickards*, 2

89. When a bill of exchange is drawn in a set according to the custom of merchants, and one of the set is duly stamped, the other or others of the set shall, unless issued or in some manner negotiated apart from the stamped bill, be exempt from duty; and upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of a set which has not been issued or in any manner negotiated apart from the lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of the lost or destroyed bill.

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IX.

One bill only of a set need be stamped.

Marketable Securities (and Foreign and Colonial Share Certificates) (i).

82.—(1.) Marketable securities for the purpose of the charge of duty thereon include—

Meaning of marketable securities for charge of duty and foreign and colonial share certificate.

- (a.) A marketable security, made or issued by or on behalf of any company or body of persons corporate or unincorporate formed or established in the United Kingdom; and
- (b.) A marketable security by or on behalf of any foreign state or government, or foreign or colonial municipal body, corporation, or company (hereinafter called a foreign security), bearing date or signed after the third day of June one thousand eight hundred and sixty-two,
 - (i.) Which is made or issued in the United Kingdom, or
 - (ii.) Which, though originally issued out of the United Kingdom, has been, after the sixth day of August one thousand eight hundred and eighty-five, or is offered for subscription, and given or delivered to a subscriber in the United Kingdom, or
 - (iii.) Which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom; and
- (c.) A marketable security by or on behalf of any colonial government which if the borrower were a foreign government would be a foreign security (hereinafter called a colonial government security).

H. & N. 57; or request short of a formal demand made for payment, *Griffin v. Weatherby*, L. R. 3 Q. B. 753.

(i) Marketable security is defined by s. 122, as any security

capable of being sold in any stock market in the United Kingdom. 56 Vict. c. 7 repeals the annual duties and the words "Foreign or Colonial Share Certificate" in the schedule.

CHAPTER
IX.*Equitable Mortgage.*

86.—(2.) For the purpose of this act the expression “equitable mortgage” means an agreement or memorandum, under hand only, relating to the deposit of any title deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security)(*k*), or creating a charge on such property.

Notarial Acts.

Duty may be denoted by adhesive stamp.

90. The duty upon a notarial act, and upon the protest by a notary public of a bill of exchange or promissory note, may be denoted by an adhesive stamp, which is to be cancelled by the notary.

Receipts.

Provisions as to duty upon receipts.

101.—(1.) For the purposes of this act the expression “receipt” includes any note, memorandum, or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person.

(2.) The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

Terms upon which receipts may be stamped after execution.

102. A receipt given without being stamped may be stamped with an impressed stamp upon the terms following; that is to say,

- (1.) Within fourteen days after it has been given, on payment of the duty and a penalty of five pounds ;
- (2.) After fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of ten pounds ;

An instrument intended to be a promissory note only, may yet require the higher stamp of a marketable security if it virtually entitles the holder to the benefit of any security, *Brown, Shipley & Co. v. Commissioners Inland Revenue*, [1895] 2 Q. B. 598 ; 64 L. J. 585. Much of the

Colonial Loans is now Inscribed Stock and there is no instrument transferable by delivery. As to what constitutes a “making” or “issue” here, see *Rerelstoke, Lord, v. Commissioners Inland Revenue*, [1898] Ap. Cas. 565 ; 67 L. J. 855.

(*k*) See ante, p. 13.

and shall not in any other case be stamped with an impressed stamp.

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IX.

SCHEDULE.

	£	s.	d.
AGREEMENT or any Memorandum of an Agreement, made in England or Ireland under hand only, or made in Scotland, without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument	0	0	6

Exemptions.

- (1.) Agreement or memorandum the matter whereof is not of the value of 5*l*.
(3.) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise.

BANK NOTE—

For money not exceeding 1 <i>l</i>	0	0	5
Exceeding 1 <i>l</i> . and not exceeding 2 <i>l</i>	0	0	10
" 2 <i>l</i> . " 5 <i>l</i>	0	1	3
" 5 <i>l</i> . " 10 <i>l</i>	0	1	9
" 10 <i>l</i> . " 20 <i>l</i>	0	2	0
" 20 <i>l</i> . " 30 <i>l</i>	0	3	0
" 30 <i>l</i> . " 50 <i>l</i>	0	5	0
" 50 <i>l</i> . " 100 <i>l</i>	0	8	6

And *see* sections 29, 30, and 31.

BILL OF EXCHANGE—

Payable on demand or at sight or on presentation ...	0	0	1
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And *see* sections 32, 34, and 38 (1)

Bill of Exchange of any other kind whatsoever (*except a Bank Note*) and Promissory Note of any kind whatsoever (*except a Bank Note*)—drawn, or expressed to be payable, or actually paid, or endorsed, or in any manner negotiated in the United Kingdom.

Where the amount or value of the money for which the bill or note is drawn or made does not exceed 5 <i>l</i>	0	0	1
Exceeds 5 <i>l</i> . and does not exceed 10 <i>l</i>	0	0	2
" 10 <i>l</i> . " 25 <i>l</i>	0	0	3
" 25 <i>l</i> . " 50 <i>l</i>	0	0	6
" 50 <i>l</i> . " 75 <i>l</i>	0	0	9
" 75 <i>l</i> . " 100 <i>l</i>	0	1	0
" 100 <i>l</i> .—			
for every 100 <i>l</i> ., and also for any fractional part of 100 <i>l</i> ., of such amount or value	0	1	0

(1) Though postdated a penny stamp is enough. The test is—does the instrument when tendered in evidence comply on its face with the act? *Gatty v. Fry*, 2 Ex. Div. 265; followed in *Royal Bank of Scotland v.*

Tottenham, [1894] 2 Q. B. 715; *Currie v. Misa*, 1 Ap. Cas. 555; when by custom the draft was not to be available till the next foreign post-day, *Clarke v. Roche*, 3 Q. B. D. 70.

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IX.

Exemptions.

£ s. d.

- (1.) Bill or note issued by the Bank of England or the Bank of Ireland.
- (2.) Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers.
- (3.) Letter written by a banker in the United Kingdom to any other banker in the United Kingdom, directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made or to any person on his behalf.
- (4.) Letter of credit granted in the United Kingdom, authorizing drafts to be drawn out of the United Kingdom payable in the United Kingdom.
- (5.) Draft or order drawn by the Paymaster-General on behalf of the Court of Chancery in England or by the Accountant-General of the Supreme Court of Judicature in Ireland.
- (6.) Warrant or order for the payment of any annuity granted by the National Debt Commissioners, or for the payment of any dividend or interest on any share in the Government or Parliamentary stocks or funds.
- (7.) Bill drawn by any person under the authority of the Admiralty, upon and payable by the Accountant-General of the Navy.
- (8.) Bill drawn (according to a form prescribed by Her Majesty's orders by any person duly authorized to draw the same) upon and payable out of any public account for any pay or allowance of the army or auxiliary forces or for any other expenditure connected therewith.
- (9.) Draft or order drawn upon any banker in the United Kingdom by an officer of a public department of the State for the payment of money out of a public account.
- (10.) Bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue (*m*).
- (11.) Coupon or warrant for interest attached to and issued with any security, or with an agreement or memorandum for the renewal or extension of time for a payment of a security.

And *see* sections 32, 33, 34, 35, 36, 37, 38, and 39.

CONTRACT NOTE for or relating to the sale or purchase of any stock or marketable security (*n*)—

Of the value of 5 <i>l</i> . and under the value of 100 <i>l</i>.	...	0	0	1
„ 100 <i>l</i> . or upwards ...	...	0	0	6

And *see* sections 52 and 53.

(*m*) This only includes the transfer of public money from one department to another, *London Clearing House Commis-*

sioners v. Commissioners Inland Revenue, [1896] 1 Q. B. 542.

(*n*) Now 1*s*. for values of 100*l*. and upwards. 56 Vict. c. 7, s. 3.

MARKETABLE SECURITY (nn) (AND FOREIGN OR COLONIAL SHARE CERTIFICATE).

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£ s. d.

- (1.) Marketable security (a) being a colonial government security or (b) being a security not transferable by delivery or (c) being a security transferable by delivery and bearing date or signed (or offered for subscription) before or on the sixth day of August one thousand eight hundred and eighty-five—

For or in respect of the money thereby secured

The same ad valorem duty according to the nature of the security as upon a mortgage.

- (2.) Transfer, Assignment, Disposition, or Assignment of a marketable security of any description—

Upon a sale thereof—see conveyance or transfer of sale.

Upon a mortgage thereof—see mortgage of stock or marketable security.

In any other case than a sale of mortgage ... 0 10 0

- (3.) Marketable security (except a colonial government security) being a security transferable by delivery and bearing date or signed or offered for subscription after the sixth day of August one thousand eight hundred and eighty-five—

For every 10l. and also for any fractional part of 10l., of the money thereby secured ... 0 1 0

- (4.) Marketable security (except a colonial government security) being such security as last aforesaid given in substitution for a like security duly stamped in conformity with the law in force at the time when it became subject to duty—

For every 20l., and also for any fractional part of 20l., of the money thereby secured ... 0 0 6

MORTGAGE, Bond, Debenture, Covenant (except a marketable security otherwise specially charged with duty), and Warrant of Attorney to confess and enter up judgment.

- (1.) Being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money—

Not exceeding 10l.	...	...	...	...	0	0	3
exceeding 10l. and not exceeding 25l.	...	...	...	...	0	0	8
" 25l.	"	50l.	...	...	0	1	3
" 50l.	"	100l.	...	...	0	2	6
" 100l.	"	150l.	...	...	0	3	9
" 150l.	"	200l.	...	...	0	5	0
" 200l.	"	250l.	...	...	0	6	3
" 250l.	"	300l.	..	...	0	7	6
" 300l.							

For every 100l., and also for any fractional part of 100l., or the amount secured ... 0 2 6

(nn) The words "Foreign or Colonial share certificate" were repealed by 56 Vict. c. 7; and the words "or offered for subscription" by 61 & 62 Vict. c. 46. The annual duties were repealed by 56 Vict. c. 7.

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	£	s.	d.
(2.) Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped : For every 100£., and also for any fractional part of 100£., of the amount secured	0	0	6
(3.) Being an equitable mortgage For every 100£., and any fractional part of 100£., of the amount secured	0	1	0
(4.) Transfer, Assignment, Disposition, or Assignment of any mortgage, bond, debenture, or covenant (except a marketable security), or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment : For every 100£., and also for any fractional part of 100£., of the amount transferred, assigned, or disposed, exclusive of interest which is not in arrear	0	0	6
And also where any further money is added to the money already secured	{ The same duty as a principal security for such further money.		
(5.) Reconveyance, Release, Discharge, Surrender, Resurrender, Warrant to Vacate, or Renunciation of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured : For every 100£., and also for any fractional part of 100£., of the total amount or value of the money at any time secured			
And see sections 86, 87, 88, and 89	0	0	6
PROTEST of any bill of exchange or promissory note :			
Where the duty on the bill or note does not exceed 1s.	{ The same duty as the bill or note.		
In any other case	0	1	0
And see section 90.			
RECEIPT given for, or upon the payment of, money amounting to 2£. or upwards			
	0	0	1

Exemptions.

- (1.) Receipt given for money deposited in any bank, or with any banker, to be accounted for and expressed to be received of the person to whom the same is to be accounted for.
- (2.) Acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment.
- (7.) Receipt given for any principal money or interest due on an exchequer bill.
- (8.) Receipt written upon a bill of exchange or promissory note duly stamped, or upon a bill drawn by any

person under the authority of the Admiralty, upon and payable by the Accountant General of the Navy (o).

- (9.) Receipt given upon any bill or note of the Bank of England or the Bank of Ireland.
- (11.) Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned.

It appears that the following instruments are free from duty under this and previous statutes :—

Bills and notes exempt.

Bills and notes of the Bank of England and Bank of Ireland (*p*) ;
Notes for one pound, one guinea, two pounds, or two guineas, payable to bearer on demand, issued by the Bank of Scotland, Royal Bank of Scotland, and British Linen Company (*q*) ;
Bills or notes issued by bankers paying a composition in lieu of stamps (*r*) ;
Bills drawn for the expenses of the navy and army (*s*) ;
Notes of loan (*t*), friendly (*u*), and building societies (*x*).

An instrument that has been paid at maturity by the party primarily liable cannot be re-issued (*y*).

What instruments may be re-issued.

Bank notes issued duly stamped, or issued unstamped by a banker duly licensed or otherwise authorized to issue unstamped bank notes may be from time to time re-issued without further duty (*z*).

(*o*) This exemption is repealed by 58 Vict. c. 16, s. 9, which, however, provides that neither the name of a banker (whether with words of receipt or not) on a duly stamped bill or note, nor that of a payee on a draft to order, shall be liable to stamp duty as a receipt.

(*p*) 55 Geo. 3, c. 184, s. 21 ; 7 & 8 Vict. c. 32, s. 7 ; Exemp. Tit. 1. The privileges of the Banks of England and Ireland are not affected by the Code. See sect. 97 (3) c.

(*q*) 55 Geo. 3, c. 184, s. 23.

(*r*) 9 Geo. 4, c. 23 ; 7 Geo. 4, c. 46, s. 16 ; 7 & 8 Vict. c. 32, s. 22 ; 17 & 18 Vict. c. 83, s. 11 ; 54 & 55 Vict. c. 39, s. 30.

(*s*) Exemp. Tits. 7 & 8.

(*t*) 3 & 4 Vict. c. 110, made perpetual by 26 & 27 Vict. c. 56, repealed by Stat. Law Amendment Act, 1875. Quære whether

the 38 & 39 Vict. c. 60, and now 59 & 60 Vict. c. 25, do not apply to societies formed since 1875. A joint and several note was within the former Act. *Bradburn v. Whitbread*, 5 M. & G. 439.

(*u*) 59 & 60 Vict. c. 25, s. 33. But they must be strictly for the purposes of the society, and not generally negotiable. *Attorney-General v. Gilpin*, 40 L. J., Ex. 134 ; *In re Coltman*, L. R., 19 Chan. D. 69.

(*x*) 37 & 38 Vict. c. 42, s. 41.

(*y*) *Morley v. Culverwell*, 7 M. & W. 174 ; *Bartrum v. Caddy*, 9 A. & E. 275 ; 1 P. & D. 207 ; *Woodward v. Pell*, 37 L. J., Q. B. 41 ; L. R., 4 Q. B. 55. Code, s. 59.

(*z*) 54 & 55 Vict. c. 39, s. 30. For penalty both on issuer and receiver of a note unduly issued unstamped, see sect. 31 ; and 55 Geo. 3, c. 184, s. 27.

CHAPTER
IX.Reservation
of interest.

The reservation of interest on a bill or note does not in any case render a larger stamp necessary ; for the object of the legislature was to impose a *pro rata* stamp duty on the sum actually due at the time of taking the security, and not upon what might become due in future for the use of the money (*a*) ; although interest be reserved from a day prior to the date of the instrument (*b*).

Effect of want
of a stamp.

A bill or note not duly stamped is not available, nor evidence in law or equity for any purpose in furtherance of its original design, not even as an admission (*c*). But an instrument not duly stamped might always be looked at for a collateral purpose. In an action for money lent, the plaintiff's witnesses proved that plaintiff had lent defendant 40*l.*, and that defendant had given him a promissory note on unstamped paper : the defendant's case was that plaintiff had inveigled him to drink, and that the transaction was fraudulent. The note was produced. Lord Ellenborough : "The note certainly cannot be received in evidence as a security, or to prove the loan of the money ; but I think it may be looked at by the jury as a contemporary writing to prove or disprove the fraud imputed to the plaintiff." The note was put in, and had very much the appearance of having been written by a drunken man. Verdict for the defendant (*d*). The statute 17 & 18 Vict. c. 83, s. 27, contained an express provision that an unstamped instrument might be admitted in any *criminal* proceeding. But long before that statute it had been held no defence in a prosecution for forgery that the instrument was not duly stamped (*e*). So it has been held that if A. and B. enter into a written agreement, duly stamped, and afterwards

(*a*) *Pruessing v. Ing*, 4 B. & Ald. 204 ; 23 R. R. 253.

(*b*) *Wills v. Noot*, 4 Tyrw. 726 ; 39 R. R. 886.

(*c*) Sect. 14 (4) ; *Wilson v. Vysar*, 4 Taunton, 288 ; *Jardine v. Payne*, 1 B. & Ad. 663 ; *Cundy v. Marriatt*, 1 B. & Ad. 696 ; 35 R. R. 416. But an unstamped instrument was admissible to prove an agreement illegal, *Coppock v. Bower*, 4 M. & W. 361 ; or to prove usury, *Nash v. Duncomb*, 1 M. & Rob. 104 ; or to corroborate a witness, *Dover v. Maestaer*, 5 Esp. 92 ; or to refresh his memory, *Maughan v. Hubbard*, 8 B. & C. 14 ; 32 R. R. 328 ; *Birchall v. Bullough*, [1896] 1 Q. B. 325 ;

65 L. J. 252. In *Smart v. Nokes*, 6 M. & G. 911, the Court of C. P. allowed an unstamped bill to be given in evidence to negative by anticipation a plea of payment. *Sed quære*, and see sect. 14 (4) ; and *Ashling v. Boon*, [1891] 1 Ch. D. 568 ; 60 L. J. 306.

(*d*) *Gregory v. Fraser*, 3 Camp. 454 ; and see *Holmes v. Sizsmith*, 7 Ex. 802 ; *Watson v. Poulson*, 15 Jur. 1111 ; *Keable v. Payne*, 8 A. & E. 555 ; *R. v. Gompertz*, 9 Q. B. 824.

(*e*) *R. v. Hawkswood*, Bayley, 6th ed. 91 ; 3 East, P. C. 955 ; *R. v. Tenque*, Bayley, 6th ed. 574 ; 2 East, P. C. 79.

enter into another written agreement on the same subject-matter, but inconsistent with the first, and not stamped, though the plaintiff cannot give the second agreement in evidence, it may be looked at by the Court to prove that the first agreement was rescinded (*f*). But when the acceptor of a bill required the drawer, who was an illiterate person, to take his second acceptance at six months, in lieu of payment, and the drawer having assented, the acceptor's son wrote the second bill on the back of the first, and the drawer and acceptor signed the second bill, and then the acceptor's son drew a line through the acceptance on the first bill; it was held, in an action on the first bill by the drawer against the acceptor, that the second bill could not be submitted to the jury for the purpose of enabling them to judge whether the cancelling of the original acceptance were with the assent of the plaintiff (*g*).

A note, reciting that deeds had been deposited as a security, does not, as a note, require a mortgage stamp (*h*). A promissory note which amounts to an equitable mortgage may have the mortgage stamp affixed subsequently (*i*).

The objection to the stamp, whether for insufficiency or absence, should in general be taken before the instrument is read; hence, where it is intended to rely on such a point, the pleadings must be so framed as to necessitate the production of the instrument. But where the defect requires extrinsic evidence to show it, the instrument is to be shown to the judge, and the ground of objection afterwards proved (*k*). If a judge of the High or a County Court rule against a stamp objection, his decision cannot be reviewed, and he ought not to reserve the point (*l*). The absence of a stamp on a bill or note cannot be pleaded

(*f*) *Reed v. Deere*, 1 B. & C. 261; see *Swears v. Wills*, 1 Esp. 317.

(*g*) *Sweeting v. Halse*, 9 B. & C. 365; 4 M. & R. 287. It was held in *Jones v. Ryder*, 4 M. & W. 32, that a promissory note, improperly stamped, could not be received in evidence to take a case out of the Statute of Limitations; and see *Holmes v. Mackrell*, 3 C. B., N.S. 789.

(*h*) *Fancourt v. Thorne*, 9 Q. B. 312.

(*i*) *Wise v. Charlton*, 4 A. & E. 786; 6 N. & M. 362; 2 H. & W. 49, ss. 4 (b) and 86 (2). But not

the note stamp, 37 (2). And see ante, p. 13.

(*k*) *Field v. Woods*, 7 Ad. & El. 114; 2 Nev. & P. 117.

(*l*) Ord. XXXIX. r. 8; 17 & 18 Vict. c. 125, s. 31; *Siordet v. Kuczynski*, 17 C. B. 251; *Heiser v. Grout*, 5 H. & N. 35; *Blewitt v. Tritton*, 61 L. J. 773; *Mander v. Ridgway*, [1898] 1 Q. B. 501. But see *Eames v. Smith*, 1 Jur. N. S. 1025. But an improper rejection of a document is (subject to Ord. XXXIX. r. 6) ground for a new trial. *Sharpley v. Richards*, 2 H. & N. 57.

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unless the plea show that the instrument cannot be made good by being stamped before the trial (*m*).

Presumption
as to stamp.

If a bill be either lost, or detained by the opposite side after notice to produce, the presumption of law is that it was duly stamped, unless the contrary be shown (*n*).

(*m*) *Bradley v. Bardsley*, 15 L. J., Ex. 115 ; 3 D. & L. 476 ; 14 M. & W. 873. See, however, *Lazarus v. Cowie*, 3 Q. B. 465 ; *Tattersall v. Fearnley*, 17 C. B. 368.

(*n*) *Marine Insurance Co. v. Haviside*, L. R., 5 H. L. 625.

CHAPTER X.

FOREIGN BILLS AND NOTES, SETS, PARTS AND COPIES.

<i>What are Inland Bills</i>	<i>Indorser of more Parts</i>
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<i>Under the Stamp Act</i> . . . 135	<i>To whom Bill belongs if</i>
<i>At Common Law</i> . . . 136	<i>Parts in different Hands</i> 138
<i>Bill in a Set</i> . . . 136	<i>Stamp</i> . . . 138
<i>Constitute only one Bill</i> . 137	<i>Liability of the Drawee</i> . 138
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CHAPTER
X.

BILLS of exchange are either inland or foreign.

An inland bill is one which is, or on the face of it purports to be, both drawn and payable within the British Islands, or drawn within the British Islands upon some person resident therein.

Any other is a foreign bill.

Unless the contrary appear on the face of the bill or note, the holder may treat it as inland (*a*).

For the purposes of the present Stamp Act, 54 & 55 Vict. c. 39, only bills or notes made (or purporting to be made) out of the United Kingdom, are to be deemed foreign bills or notes (*b*).

What bills are inland under the Code.

Under the Stamp Act.

(*a*) Code, s. 4. Hence protest is unnecessary. British Islands include the Isle of Man and the Channel Islands, as well as the United Kingdom of Great Britain and Ireland. Com. Dig. tit. Nav. 2, 3 & 4; *Godfrey v. Cushman*, 13 Moo. P. C. C. 11; *Heywood v. Pickering*, L. R., 9 Q. B. 428. By the 19 & 20 Vict. c. 97, s. 7. (this section is repealed by Code), bills and notes drawn or made in one part and payable in any other part of the British Islands were inland. A cheque, therefore, though really drawn abroad, if it do not show that on its face,

is, or at all events may be, treated as inland. A bill drawn in England on a person residing abroad, but drawn and accepted payable in England, has been held inland within the Stamp Act. *Amner v. Clark*, 2 C., M. & R. 468.

(*b*) Sects. 34-36. Hence bills or notes drawn or made in the Channel Islands or Isle of Man are inland bills, so far as the law is concerned, but foreign bills for the Stamp Act. *Griffin v. Weathersby*, L. R., 3 Q. B. 753; *Heywood v. Pickering*, L. R., 9 Q. B. 428.

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X.At common
law.

Inland bills, at common law, are such as are both drawn and payable within the limits of England, Wales, and Berwick-on-Tweed. Foreign bills at common law are such as are drawn or payable abroad, or drawn in one realm of the United Kingdom, and payable in another (*c*). A bill of exchange is *primâ facie* inland; but in an action brought on a foreign bill against a drawer or indorser, the declaration ought to have stated it to be so (*d*), or the defendant would be entitled to succeed on the ordinary traverses of the material allegations in the declaration.

Formerly, the acceptor of a bill purporting to be foreign, but really made in England, and known by the acceptor at the time of acceptance to be so, was not precluded from objecting, in an action by an innocent indorsee, that it really was an inland bill, and therefore void for want of a stamp (*e*). But there was an implied warranty by a transferor that a bill apparently drawn abroad really was so (*f*). Now, however, every bill of exchange which shall purport to be drawn at any place out of the United Kingdom, shall, for the purposes of the Stamp Act, be deemed a foreign bill (*g*).

Bill in a set.

Foreign bills are often drawn in parts, each part being numbered and containing a reference to the other parts; the whole of the parts then constitute one bill (*h*).

(*c*) Com. Dig. tit. Navigation, 2, 3, 4. The Union did not make bills drawn in England, but payable in Scotland or Ireland, or *vice versa*, inland. *Mahoney v. Ashlin*, 2 B. & Ad. 478; but they were inland within the 1 & 2 Geo. 4, c. 78, requiring a written acceptance.

(*d*) *Armani v. Castrique*, 13 M. & W. 443.

(*e*) *Steadman v. Duhamel*, 1 C. B. 888.

(*f*) *Gompertz v. Bartlett*, 2 E. & B. 854.

(*g*) 54 & 55 Vict. c. 39, s. 36; see, too, 27 & 28 Vict. c. 56, s. 2 (now repealed); and 17 & 18 Vict. c. 83, s. 4 (also repealed); and *Sjordet v. Kuczinski*, 17 C. B. 251. The Code covers the case of a bill really drawn abroad, but purporting to be drawn here; *e.g.*, a cheque drawn abroad by an Englishman travelling, which might otherwise when presented

or negotiated here require an *ad valorem* stamp; see, however, *Ex parte Boyse*, 33 Ch. D. 612; 56 L. J. 135; and sect. 34 (1) and Sched. tit. "Bill on demand."

(*h*) Code, s. 71. Il existe dans la négociation des lettres de change un usage qui la facilite et assure leur paiement rapide; c'est la faculté de tirer par première, seconde, et troisième, &c., &c., c'est à dire de souscrire plusieurs exemplaires.

Cet usage remonte à des temps déjà reculés; il était en vigueur sous l'ancienne législation, et Cleirac en cite des exemples qui se rapportent au milieu du seizième siècle.

Il n'est pas sans intérêt de reproduire ses observations fort sensées:

"Et d'autant que les lettres de change sont des papiers volans, des petits poulets, ou billets, *Polizza di Cambio*, qui se peuvent

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Exemplars, or parts of the bill, are made on separate pieces of paper, each part being numbered, and referring to the other parts. Each part contains a condition that it shall continue payable only so long as the others remain unpaid. These parts should circulate together; or one may be forwarded for acceptance while the other is delivered to the indorsee, thus relieving him from the necessity of forwarding his part for acceptance, but giving him the indorser's security immediately, and diminishing the chances of losing the bill. Every transferor is bound to hand over to his transferee all the parts of the bill in his possession, and he may even be liable to hand them over to a subsequent transferee, if he have them still in his possession (i).

The whole set, of how many parts soever it be composed, constitutes but one bill, and the regular payment and cancellation of any one of the parts extinguishes all (k).

The whole set
but one bill.

A firm, who were both payees and acceptors of a foreign bill in three parts, indorsed one part to a creditor to remain in his hands till some other security were given for it, and then indorsed another part of the same bill for value to a third person. They afterwards gave the first indorsee the proposed security, and took back the first part of the bill from him. Held, that the holder of the second part was not precluded from recovering against the firm; first, because the substitution of the security for the first part was not a payment; and, secondly, because the firm were, as between themselves and the second indorsee, estopped from disputing the regularity of their acceptance and indorsement of the second part (l).

Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every

Liability of
indorser of
more than one
part.

facilement esdiner et perdre. Comme aussi le banquier correspondant à Paris peut manquer au paiement, c'est pourquoi, tant le bourgeois qui a tiré, que son commissionnaire résidant à Paris, ont chacun besoin d'une copie pour faire leurs diligences. A cette cause le banquier doit écrire, et fournir par précaution deux ou trois copies de la même lettre de semblable teneur." Nougier des Lettres de Change, 1, 104.

The facility which drawing a bill in sets affords for its present-

ment, has been held to accelerate the time within which a bill, payable after sight, ought to be presented for acceptance. *Straker v. Graham*, 4 M. & W. 721.

(i) *Pinard v. Klockman*, 32 L. J., Q. B. 82; 3 B. & S. 388.

(k) Code, s. 71. Byles on Bills, 6th Amer. edition, 578. A contract to deliver up a bill drawn in parts, is a contract to deliver up every part. *Kearney v. West Granada Mining Company*, 1 H. & N. 412.

(l) *Holdsworth v. Hunter*, 10 B. & C. 449; 34 R. R. 479.

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indorser subsequent to him is liable on the part he has himself indorsed, as if the said parts were different bills.

To whom bill belongs when parts are in different hands.

Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, deemed the true owner of the bill; but the rights of a person who in due course accepts or pays the part first presented to him are not thereby affected (*m*).

Stamp.

Each part is now subject to a stamp if issued or negotiated apart from the others (*n*).

Liability of drawee.

The drawee should accept only one part. For if two accepted parts should come into the hands of different holders, and the acceptor should pay one, it is possible that he may be obliged to pay the other part also (*o*).

And he should not pay without taking back the part which he has accepted (*p*), for, having paid the unaccepted part, he may be obliged afterwards to pay the accepted part also.

It is conceived, that an indorser is not bound to pay any one part, unless every part bearing his indorsement be delivered up to him (*q*).

Copies of bills.

Copies of bills are not, it is believed, much used in this country. A protest may be made on the copy of a lost

(*m*) Sect. 71. *Holdsworth v. Hunter*, 10 B. & C. 449; 34 R. R. 479; *Perreira v. Jopp*, 10 B. & C. 450; 34 R. R. 480, n.; *Soc. Gen. de Paris v. Banque Hongroise*, 11 T. L. R. 244. The first holder may, it is said, maintain trover for the other parts even against a subsequent *bonâ fide* holder. *Lang v. Smyth*, 7 Bing. 284; 5 M. & P. 78; 33 R. R. 462. An omission on one part to express the reference to the others may have the effect of obliging the drawer to pay more than one part. *Davidson v. Robertson*, 3 Dow. 218; Beawes, 430; Poth. 111; 2 Pard. 367.

(*n*) 54 & 55 Vict. c. 39, s. 39. If a man be under an obligation to deliver a foreign bill, it seems he must deliver as many parts as are applied for. 1 Pard. 334.

(*o*) See *Holdsworth v. Hunter*, 10 B. & C. 449; 34 R. R. 479; Code, s. 71.

(*p*) Celui qui paie une lettre de change sur une deuxième, troisième, quatrième, &c., sans retirer celle sur laquelle se trouve son acceptation, n'opère point sa libération à l'égard du tiers porteur de son acceptation. Code de Commerce, Art. 148.

(*q*) Lorsqu'une deuxième porte qu'elle ne sera payée qu'autant que la première ne l'aura pas été; l'endosseur qui endosse les deux exemplaires n'est point responsable envers le porteur de la seconde qui a reçu ce titre, tandis que la première était également en circulation.

Dans ce cas le porteur de la seconde est averti par les énonciations qu'elle contient. Pour se mettre à l'abri des fraudes de son cédant, il doit se faire remettre la première. Cour de Cassation, 4 Avril, 1832; Sirey, t. 32, l. 29.

bill (*r*). But, abroad, when a bill is not drawn in sets, it is sometimes the practice to negotiate a copy, while the original is forwarded to a distance for acceptance.

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In such a case, the person who circulates the copy should transcribe the body of the bill, and all the indorsements including his own, literally, and, after all, he should write "Copy:—the original being with such a person." If he should omit to state that the bill is a copy, or to write his own indorsement *after* the word *copy*, he may become liable on the copy as on an original (*s*).

It is a common but not a safe practice for a drawer, to whom a negotiated part has come back with many indorsements on it, to substitute a new part without such indorsements. The holder of such a substituted part may be deprived of his remedy against the acceptor by the intermediate act of the drawer (*t*).

Substitutions.

(*r*) *Dehers v. Harriot*, 1 Show. 163 : Code, s. 51 (8).

(*s*) L'usage des copies, quoiqu'il ne soit pas consacré par la loi, n'en est pas moins valable. L'endosseur qui crée une copie, après avoir négocié l'original, est tenu de mentionner dans la copie l'endossement qu'il a écrit sur le titre même. Si, au contraire.

après ces mots *pour copie*, il appose un endos, il fait supposer que l'original n'est pas endossé, et il est responsable vis-à-vis du porteur de bonne foi de la copie. Cour Royale de Paris, 14 Janvier, 1830 : Sirey, t. 30, l. 172.

(*t*) *Ralli v. Dennistoun*, 6 Exch. 483.

CHAPTER XI.

OF THE CONSIDERATION.

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CHAPTER XI.

Presumption as to consideration on bills and notes.

IF a man seek to enforce a simple contract, he must, in pleading, aver that it was made on good consideration, and must substantiate that allegation by proof. But to this rule bills and notes are an exception. It is never necessary to

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aver consideration for any engagement on a bill or note, or to prove the existence of such consideration, unless a presumption against it be raised by the evidence of the adverse party, or unless it appear that injustice will be done to the defendant, or that the law will be violated, if the plaintiff recover. In the case of other simple contracts, the law presumes that there was no consideration till a consideration appear; in the case of contracts on bills or notes, a consideration is presumed till the contrary appear, or at least appear probable (a).

Every holder of a bill or note is, *primâ facie*, a holder in due course, and therefore is presumed to be among other things a holder for value; but if in an action on a bill or note it is admitted or proved that the acceptance or making, issue, or subsequent negotiation is affected with fraud, duress, or illegality, the burden of proof is shifted, and those presumptions no longer exist, unless the holder prove that subsequently to the alleged fraud he or some one through whom he derives title gave value in good faith. Hence the defendant is not permitted to put the plaintiff on proof of the consideration which the plaintiff gave for the bill, unless the defendant can make out a *primâ facie* case against him, by showing that the bill was obtained from the defendant, or from some intermediate party, by undue means, as by fraud or force (b) (or that it was lost) (c), or that it was originally infected with illegality.

When burden of proof shifted.

These words (s. 30(2)) do not apply where as between the original parties to a Bill. Talbot v. van Boven (1907) 80 L.J. K.B. 661. (C.A.)

It was formerly held, that the defendant could call on the plaintiff to prove consideration, by showing the bill to be

In the case of an accommodation bill.

(a) Code, s. 30. To obtain the usual decree in a creditor's suit it is not sufficient for the plaintiff to put in an acceptance of the testator proved as an exhibit. Quære, whether any evidence should be given of the consideration. *Keaton v. Lynch*, 1 Y. & Col. N. S. 437. And where an account is directed by a Court of Equity to be taken of dealings between an attorney and his client, it is not sufficient that the attorney produce bills and notes given by the client to him, he must prove the consideration. *Jones v. Thomas*, 2 Y. & Col. 498.

(b) As to a note obtained by duress of goods, see *Kearns v. Durell*, 6 C. B. 596. The distinction seems to be between a

payment, or a transaction in the nature of payment, which is void for duress of goods, and a contract, which cannot be so avoided. As to compulsion in the nature of duress of land, see *Close v. Phipps*, 7 M. & G. 586. See also *Atkinson v. Denby*, 30 L. J., Exch. 361; 7 N. & M. 934.

(c) *Harvey v. Towers*, 6 Exch. 656; *Mather v. Lord Maidstone*, 26 L. J., C. P. 58; 1 C. B., N. S. 273. But a wager which is not prohibited, but only void under 8 & 9 Vict. c. 109, has been held not to be such an illegality of consideration as will change the burthen of proof. *Fitch v. Jones*, 5 E. & B. 238. Loss of a bill is not specified in sect. 30 (2).

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an accommodation bill, or that the defendant received no value (*d*). But it is now definitely settled, after consideration by all the judges, that mere absence of consideration received by the defendant will not entitle him to call on the plaintiff to prove the consideration which the plaintiff gave. "There is," says Lord Abinger, delivering the judgment of the Court of Exchequer, "a substantial distinction between bills given for accommodation only, and cases of fraud, inasmuch as in the former case it is to be presumed that money has been obtained upon the bill. If a man comes into Court without any suspicion of fraud, but only as the holder of an accommodation bill, it may fairly be presumed that he is a holder for value. The proof of its being an accommodation bill is no evidence of the want of consideration in the holder. If the defendant says, 'I lent my name to the drawer for the purpose of his raising money upon the bill,' the probability is that money was obtained upon the bill." Unless, therefore, the bill be connected with some fraud, and a suspicion of fraud be raised from its being shown that something has been done with it of an illegal nature, as that it has been clandestinely taken away,

(*d*) See *Heath v. Sansom*, 2 B. & Ad. 291; *Duncan v. Scott*, 1 Camp. 100; *Grant v. Vaughan*, 3 Burr. 1516; *King v. Milson*, 2 Camp. 5; 11 R. R. 646; *Paterson v. Hardacre*, 4 Taunt. 114; *Thomas v. Newton*, 2 C. & P. 606; *De la Chaumette v. Bank of England*, 9 B. & C. 208; 33 R. R. 643; *Bassett v. Dodgin*, 10 Bing. 40; 3 M. & Scott, 417; *Simpson v. Clarke*, 2 C., M. & R. 342; 1 Gale, 237. It was formerly necessary, in order to enable the defendant to put the plaintiff on proof of consideration, that the defendant should have given the plaintiff notice to prove consideration. *Paterson v. Hardacre*, 4 Taunt. 114; Bayley, 6th ed. 474, 500. It is now, however, settled, that notice to prove consideration is not necessary; *Mann v. Lent*, 1 M. & M. 240; 10 B. & C. 877; *Heath v. Sansom*, 2 B. & Ad. 291; *Bailey v. Bidwell*, 13 M. & W. 75; and it is now seldom given. It was, however, before the new rules, often prudent to give notice: "For it is," says Lord Tenterden, "matter

of comment if no notice were given, or if it were not given at a reasonable time." *Mann v. Lent* 1 M. & M. 240; 10 B. & C. 877. It was formerly held that where the consideration given by the plaintiff was disputed, and a notice to that effect had been given, the plaintiff must go into his whole case in the first instance, and could not reserve the proof of consideration as an answer to the defendant's case. *Delaney v. Mitchell*, 1 Stark, 439; *Humbert v. Ruding*, Chitty, 9th ed. 651; *Spooner v. Gardiner*, R. & M., N. P. C. 86; Best, C.J., in C. P. But now, in all the Courts, the plaintiff is allowed to prove the handwriting and make out a *prima facie* case, and afterwards, in answer to the defendant's case, to prove consideration. R. & M. 255 n. If, however, he call witnesses to prove the consideration in the first instance, he will not be allowed, after the defendant's case has closed, to call other witnesses for the same purpose. See *Broune v. Murray*, R. & M. 254; 27 R. R. 748.

or has been lost or stolen (in which cases the holder must show that he gave value in good faith for it), the *onus probandi* is cast upon the defendant" (e).

An accommodation party to a bill or note is liable to a holder for value, with or without notice of the fact; even though he take it after due, as absence of consideration does not constitute one of those defects in the title of a party negotiating, which extend to the title of subsequent transferees when the bill is negotiated after it is due (f.)

If the defendant plead that the note was made on an illegal consideration, and that the plaintiff gave no value, and the plaintiff put the whole plea in issue, it will be sufficient for the defendant to prove the illegality, which will cast on the plaintiff the burthen of proving consideration (g). And in a case of fraud the defendant will equally cast the burthen of proving consideration on the plaintiff by proving so much of the plea as alleges that he, the defendant, was defrauded of the bill (h).

Rules of
pleading.

But the defendant is in all cases at liberty to show affirmatively, by his own witnesses, absence or failure of consideration, where on the issues raised that would be a defence.

(e) *Mills v. Barber*, 1 M. & W. 425; 5 Dowl. 77; 2 Gale, 5; *Percival v. Frampton*, 2 C., M. & R. 180; 3 Dowl. 748; *Whittaker v. Edmunds*, 1 M. & R. 366; 1 Ad. & E. 638; *Jacob v. Hungate*, 1 M. & R. 445; *Clarke v. Holmes*, 2 F. & F. 75. It has been held by the Court of Exchequer that a mere *admission on record* is not sufficient to put the plaintiff on proof that he is a holder for value, but that the presumption against his title must be raised by evidence before the jury. *Edmonds v. Groves*, 2 M. & W. 642; 5 Dowl. 775; and see *Smith v. Martin*, 9 M. & W. 304; *Fearn v. Filica*, 7 M. & G. 513. The Court of Queen's Bench, however, have held otherwise. *Bingham v. Stanley*, 1 G. & D. 237; 2 Q. B. 117; *Robins v. Maidstone*, 4 Q. B. 815.

(f) Code. ss. 28 (2), 29 (2), 30 (2). An accommodation party to a bill or note is one who has signed either as acceptor or maker, drawer, or indorser, with-

out value, and for the purpose of lending his name to some other person. Such a signature binds the signer to a holder for value, but it is not necessary that the holder should himself have given value, for if at any time value has been given for the bill or note, the holder is a holder for value against all parties prior to such time. Sect. 27 (2). The Code apparently makes no difference in the burden of proof in the case of an accommodation bill, hence it lies on the defendant to show that the plaintiff gave no value.

(g) *Bailey v. Bidwell*, 13 M. & W. 73. And see *Harrey v. Towers*, 6 Exch. 656.

(h) *Ibid.*; but see *Brown v. Philpot*, 2 M. & Rob. 285, overruled, however, by *Smith v. Braine*, 20 L. J., Q. B. 204; 16 Q. B. 244; *Berry v. Alderman*, 23 L. J., C. P. 35; 14 C. B. 95; *Hall v. Featherstone*, 27 L. J., Exch. 309; 3 H. & N. 284.

CHAPTER
XI.Holder in due
course.

The common phrase "*bonâ fide* holder for value," means holder for real value, in contradistinction to a holder for apparent or pretended value, but does not exclude the possibility of notice of any fraud, illegality, or other vice affecting the title; for a man may really give part or the whole value for a bill or note, though he have full notice of the fraud or illegality of the original consideration (i). He may think that the vice in the original concoction of the bill or note cannot be proved, or will not be set up as a defence, or he may rely on the solvency of other parties to the instrument. The expression "*holder in due course*," has been substituted by the Code for the former cumbrous phrase of "*bonâ fide* holder for value without notice before due." A holder in due course is one who has taken a bill or note, regular and complete on its face, in good faith and for value, before it was due, and without notice of any previous dishonour, or of any defect in the title of the person negotiating it. The title of the negotiator being defective within the meaning of the above when he obtained the bill or note, or the acceptance or making thereof, by fraud, duress, or other unlawful means, or for an illegal consideration, or when he negotiated it in breach of faith, or under such circumstances as amount to a fraud (k).

Every holder is *primâ facie* a holder in due course, and it lies upon the defendant to show that he is not, or, at all events, to rebut this presumption.

The rights of a holder in due course are laid down as follows in the Code.

By sect. 38 he can sue all parties to the bill or note. As between themselves the prior parties are principals and the subsequent parties sureties, but as regards him on due presentment and notice of dishonour (or excuse of the same) they are all liable *pari passu*, and he may enforce payment against any one at pleasure. He is free from any defect of title of prior parties (such as, for example, fraudulent signing name of firm by one partner, illegal consideration, &c.); and personal defences among themselves (such as, for example, conditional delivery, agreement not to sue, &c.).

(i) *Uther v. Rich*, 10 A. & E. 784; *Smith v. Martin*, 9 M. & W. 307.

(k) Code, s. 29. The title of a holder in due course enures as against all prior parties to such holder in due course, in favour of

an innocent transferee, whether for value or not. A lien, whether by express contract or by implication of law, constitutes the holder under it a holder for value *pro tanto*. Sect. 27 (3). But the bill must be still alive when the lien is acquired. *Redfern v. Bramhall* 86 L.T. 855. C.A.

By sect. 21 (2), a valid delivery by all prior parties is conclusively presumed in his favour.

By sect. 36 (5), when a bill not overdue is dishonoured, a subsequent holder in due course does not hold the bill subject to defects of title attaching thereto at the time of the dishonour ; and, in like manner, by sect. 48 (1), when notice of dishonour is not given for non-acceptance, a subsequent holder in due course is not prejudiced.

By sects. 54, 55, 56 and 88, acceptor or maker, drawer, indorser (and stranger indorsing), are estopped as to him from denying certain matters ; and, by sect. 58, when a bill or note is payable to bearer, the transferor, by delivery, guarantees to him or any other holder for value the genuineness of the instrument, his own title, and his ignorance of any fact rendering it valueless.

By sect. 62, no waiver by the holder of the liability of any party to a bill or note will affect him unless apprised thereof.

By sect. 64, where a bill or note has been materially altered, but the alteration is not apparent, he may enforce payment according to its original tenor.

By sects. 12 and 20, an instrument filled up after signature is enforceable in his hands whether or no it have been completed within a reasonable time, and strictly in accordance with the authority ; and so, too, if the date have been erroneously, or even wrongfully, inserted.

By sect. 29 (3), if once there have been a holder in due course of a bill or note, his title enures to any subsequent transferee, whether for value or not, not a party to the fraud or illegality. And, finally, where a bill is drawn in a set, if improperly negotiated separately, there may be two or more holders in due course of separate parts.

A holder for value simply, as distinguished from the above, is one who has himself given value, or holds under a lien, or as against the acceptor or maker and all parties prior to such time, the holder of a bill or note, for which value has at any time been given (1).

Holder for
value.

Hence we may divide the subsequent holders, other than holders in due course, of negotiable instruments vitiated by fraud or illegality, into two classes : first, transferees without value ; secondly, transferees with notice. The distinction is important, because the burden of proof in the two cases is different.

Distinction
between
holders with-
out value and
holders with
notice.

(1) Code, s. 27 (2).

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XI.

Burthen of
proof in the
case of alleged
holder with-
out value.

As soon as it appears to the jury by the defendant's evidence that the bill was originally infected with fraud, invalidity or illegality, then it is plain that, the original holder's title being destroyed, the title of every subsequent holder, which reposes on that foundation and no other, falls with it. Hence it appears that the plaintiff, the transferee, can then have no title till he shows that he, or some other holder under whom he claims, has given value in good faith for the bill (*m*). Therefore, where the question is thus raised, whether the transferee be a holder for value, it is not for the defendant to prove the absence of value, but for the plaintiff, the transferee, to prove value given either by himself or by some one under whom he claims (*n*).

Burthen of
proof in case
of alleged
holder with
notice of ille-
gality or
fraud.

But it is otherwise when the question is raised whether the plaintiff, the transferee, had notice of the original illegality or fraud. For he having shown, or it being admitted or undisputed, that he or his predecessor in title gave value, he has a new and independent title. And though possible, it is not likely, that notice of the original fraud or illegality would be communicated to subsequent holders. If, therefore, the defendant seek to impeach this new title by alleging notice of the fraud or illegality, it is for him to prove it (*o*). The averment, that the plaintiff had notice of the fraud or the illegality, is not only in form but in substance an affirmative allegation, and the maxim applies, "*Ei incumbit probatio qui dicit.*" Besides, until the alteration in the law, allowing the plaintiff to be examined as a witness on his own behalf, it might have been impossible for the plaintiff to prove the negative. Lastly, fraud, or which is the same thing, participation in a fraud, is never to be presumed without proof, but, nevertheless, the proof need not be direct, it may be indirect and circumstantial. Such, at least, was generally understood to be the law prior to the Code, which for the time-honoured phrase "*bonâ fide* holder for value" substituted "holder for value in good faith," a change not at first sight appearing to be of any great importance (*p*).

(*m*) *Smith v. Martin*, 9 M & W. 304; *Bailey v. Bidwell*, 13 M. & W. 73; *Harrey v. Towers*, 6 Exch. 656.

(*n*) *Hogg v. Skene*, 34 L. J., C. P. 155.

(*o*) *Goodman v. Harrey*, 4 Ad. & E. 870. See the observations of Parke, B., in *Bailey v. Bidwell*,

13 M. & W. 75; *Oakeley v. Ooddeen*, 11 C. B., N. S. 805. So held at the second trial of this last case, in conformity with the opinion of the majority of the Court of Common Pleas, who had previously granted a new trial on other grounds, 2 F. & F. 656.

(*p*) Code, ss. 29 & 30, *Tatam*

But absence of consideration moving from the plaintiff, proved by the defendant, or otherwise affirmatively established, may in some cases be *prima facie* evidence of notice to the plaintiff of fraud or illegality.

CHAPTER
XI.

Proof of
notice.

v. Haslar, 23 Q. B. D. 345 ; 58 L. T. 432. The Code, s. 30 (2) clearly recognizes the distinction between negotiable instruments and other chattels pointed out by Lord Ellenborough in *King v. Milson*, 2 Camp. 5 ; 11 R. R. 646, that a presumption both as to *bona fides* and value exists in favour of every holder. In *Bailey v. Bidwell*, 13 M. & W. 73, Parke, B. explains why, when fraud or illegality is proved by the defence, the burden of proof as to value is thrown on the holder, viz., to rebut the presumption of his being a mere tool in the hands of the defrauding party, who, conscious of his own inability to sue, would put the bill into the hands of some one else to do so, under colour of a transfer. Cresswell, J., in *Raphael v. Bank of England*, 25 L. J., C. P. 33 ; 17 C. B. 174 ; cites this judgment as meaning that full value was proof of *bona fides*. In *May v. Chapman*, 16 M. & W. 355, Parke, B., laid down that "wilfully shutting the eyes to the means of knowledge" was equivalent to express notice of the fraud. And this dictum is cited by Lord Blackburn in *Jones v. Gordon*, 2 App. Ca. 628, as seeming to show that the onus of proof both as to value and notice was shifted, though his lordship considered that point still undecided. The expression "in good faith" is also used in the Code as to payments, ss. 59—60, 79—80, 82 ; as to insertion of date, s. 12 ; and is defined as being "in fact honestly," s. 90. It may be worthy of notice that the whole of sub-s. 29 (b) has not been incorporated with s. 30 (2), but part, and part only. In *Tatam v. Haslar*, supra, Lord Field directed the jury that if the plaintiff really and truly

advanced the value alleged, he was a *bona fide* holder for value, and the onus of proof was on the defendant to invalidate his title. Lord Field in effect held that no substantial change in the law had been made by the Code. But this ruling was commented on in the Divisional Court as "being too favourable to the plaintiff," the Code having settled against him the question put as still open by Lord Blackburn in *Jones v. Gordon*, that when fraud was proved, the holder must show that he gave value honestly and without notice of it. In *Oakeley v. Bolton*, 5 Times L. R. 60, Lord Esher, M. R., delivering the judgment of the Court of Appeal, laid down that on fraud being proved by the defence, the plaintiff must not only show that he gave value, but gave it honestly. This the plaintiff may easily enough prove in his own case, but if the party giving the value relied on be dead, or otherwise unavailable as a witness, less evidence may suffice to satisfy the onus as to proof of *bona fides*. On this point we have been favoured with the following from the same eminent authority. "What is sufficient evidence," says Lord Esher, "that the holder who shows that he gave value, did so honestly, is another question. If the plaintiff (or party giving the value relied on) can be called, no jury would I think be satisfied unless he is called, to say that he had no knowledge of the fraud. But if he be dead, or cannot be called, proof of his having given full value would of itself be strong evidence of *bona fides* and ignorance of the fraud, there being no evidence of any suspicious circumstances."

CHAPTER
XI.

Plaintiff may stand on a prior title.

What amounts to notice.

Particular or explicit notice.

General or implicit notice.

Abstinance from inquiry.

Gross negligence not equivalent to notice.

Notice to an agent.

Although notice to the plaintiff himself be established, that alone will not destroy his right to recover, if he can make a further independent title under any intermediate holder who gave value, and had not notice.

Notice of illegality or fraud is either particular or general.

Particular or *explicit* notice is where the holder had notice of the particular facts avoding the bill. But notice of the facts more or less in detail is not necessary in order to invalidate his title. It is sufficient if he had general notice.

General or *implicit* notice is where the holder had notice that there was *some* illegality or *some* fraud vitiating the bill, though he may not have been apprised of its precise nature. Thus, if when he took the bill he were told in express terms that there was something wrong about it, without being told what the vice was, or if it can be collected by a jury from circumstances fairly warranting such an inference, that he knew, or believed, or thought, that the bill was tainted with illegality or fraud, such a general or implicit notice will equally destroy his title (*q*).

A wilful and fraudulent abstinance from inquiry into the circumstances (*r*), where they are known to be such as to invite inquiry, will (if a jury think that the abstinance from inquiry arose from a belief or suspicion that inquiry would disclose a vice in the bill) amount to general or implicit notice (*s*).

But mere negligence, however gross, not amounting to wilful or fraudulent blindness and abstinance from inquiry, will not of itself amount to notice, though it may be evidence of it (*t*).

Where the holder in taking a bill employs an agent, though the principal be unaffected with notice to himself personally, yet notice to the agent so employed, whether explicit or implicit, is notice to his principal the holder (*u*).

(*q*) *Oakeley v. Ooddeen*, 2 F. & F. 656.

(*r*) And it has even been said by the Court of Queen's Bench that gross negligence may be evidence of fraud. *Goodman v. Harrey*, 4 Ad. & E. 870.

(*s*) *Oakeley v. Ooddeen*, supra; and see *Jones v. Smith*, 1 Hare, 55; *Ware v. Lord Egmont*, 4 De

G., M. & G. 473; *Attorney-General v. Stephens*, 6 De G., M. & G. 111.

(*t*) *Goodman v. Harrey*, supra; *Jones v. Gordon*, 2 App. Ca. 628; and see the remarks of Lord Herschell in *Simmon's case*, [1892] App. Ca. at p. 221.

(*u*) *Oakeley v. Ooddeen*, supra.

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Perhaps, however, the rule may be subject to this qualification, that the knowledge of the agent, in order to affect his principal, must either have been acquired by the agent in the same transaction, or at least so recently as that it may be presumed to remain in his memory ; and it must be knowledge of a fact material to the transaction, and which it would be the duty of the agent to communicate to his principal (x). The effect of notice to an agent, commonly called constructive notice, is not to be extended (y).

as to same person
See *2 Co. two companies*,
see *Fennick, In re*
[1902] 1 Ch. 507.

But wherever the agent's conduct amounts to fraud, it is conceived that the innocent principal who takes the benefit of the agent's fraudulent act is civilly responsible for the agent's fraud (z).

It would seem, on general principles, that the payment of no bill of exchange, promissory note or cheque, given by the maker or acceptor to the payee, as a gift *inter vivos*, can be enforced by action at the suit of the donee against the donor (a). Thus, where a bill of exchange was accepted by the defendant, as a present to the payee, who indorsed it to the plaintiff for a small sum advanced to him, Lord Ellenborough held, that the plaintiff was only entitled to recover so much as he had advanced on the bill (b). The effect of a gift of a negotiable instrument, payable to bearer, or indorsed by the donor in blank, should seem on principle to be this. As between the donor and the donee, the donor cannot recover the bill back or receive the amount from prior parties (c), but the donee himself cannot sue the donor upon it. As between the donee and the other prior parties to the bill, they are liable to him. If the bill be not transferable, or be payable to order and not indorsed, it is conceived that the effect of the gift of it is to vest the legal property in the paper and the beneficial interest in

Gift, *inter vivos*, of a bill or note.

(x) *Wyllie v. Pollen*, 32 L. J., Ch. 782.

(y) *Ibid.*

(z) The rule of the civil law is conceived to be equally the rule of the English law, "*Procuratoris scientiam et dolum nocere debere domino, neque Pomponius dubitat neque nos dubitamus.*" Dig. 14, 4, 5. See *Cornfoot v. Fowke*, 6 M. & W. 373, and *Udell v. Ather-ton*, 30 L. J., Exch. 337, where the Court were equally divided. 7 H. & N. 172; *Eyn v. M. Dowell*, 14 Ir. C. C. Rep. 814.

(a) *Milnes v. Dawson*, 5 Exch.

948. The payee of a voluntary promissory note is not in the same position as the donee of a voluntary bond. *In re Whitaker*, 42 Ch. D. 119 ; 57 L. J. 527.

(b) *Nash v. Brown*, Chitty, 10th ed. 54 ; and see *Holliday v. Atkinson*, 5 B. & C. 501 ; 29 R. R. 299 ; 8 D. & R. 163 ; *Easton v. Prachett*, 4 Tyrwh. 472 ; 1 C., M. & R. 798 ; 3 Dowl. 472 ; 1 Gale, 33 ; in error, 2 C., M. & R. 542 ; 1 Gale, 250 ; but see *Milnes v. Dawson*, 5 Exch. 948.

(c) *Milnes v. Dawson*, 5 Exch. 948.

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the money in the donee (*d*) ; who, however, must recover from prior parties in the donor's name.

Nature of the
consideration.

Valuable consideration for a bill may be constituted by any consideration sufficient to support a simple contract : or by an antecedent debt or liability, and that whether the bill be payable on demand or at a future time ; a lien, also, whether arising from contract or from implication of law, makes the holder a holder for value *pro tanto*. Where value has at any time been given for a bill, the holder is a holder for value as regards the acceptor and all parties to the bill prior to such time. It may suffice to observe here, for the sake of the unprofessional reader, that a consideration is, in general, either some detriment to the plaintiff, sustained for the sake or at the instance of the defendant, or some benefit to the defendant moving from plaintiff (*e*). Natural affection is not a sufficient consideration to support a simple contract (*f*).

If a man give his acceptance to another, that will be a good consideration for a promise, or for another bill or acceptance, though such first acceptance is, after all, unpaid (*g*). And, therefore, cross acceptances for mutual accommodation are respectively considerations for each other (*h*).

Pre-existing
debt.

A pre-existing debt due to the holder of a negotiable instrument is a good consideration, whether the instrument be payable on demand or not, as much as is a fresh advance (*i*). This had been doubted unless the bill or note were payable at a future time, in which case the holder

(*d*) See *Barton v. Gainer*, 27 L. J., Exch. 390 ; 3 H. & N. 387, as to the effect of a gift of a specialty.

(*e*) Code, s. 27. It is not necessary that the consideration should move to the defendant personally ; if it moves to a third person, by his desire or acquiescence, that is sufficient. Therefore, the debt of a third person is a good consideration to support a contract on a bill payable at a future day. *Sowerby v. Butcher*, 2 C. & M. 368 ; 4 Tyr. 320 ; vide post. Past gratuitous services and future services, which the payee was under no contract to render, do not form a sufficient consideration

for a note. *Hulse v. Hulse*, 17 C. B. 711. Held otherwise in the U. S. the services having in fact been rendered though under no promise, *Miller v. McKenzie*, 47 Amer. Rep. 85 ; the principle being the same as in *Crears v. Hunter*, infra, p. 152.

(*f*) *Holliday v. Atkinson*, 5 B. & C. 501 ; 29 R. R. 299.

(*g*) *Rose v. Sims*, 1 B. & Ad. 521.

(*h*) *Cowley v. Dunlop*, 7 T. R. 565 ; *Buckler v. Buttivant*, 3 East, 72 ; *Rose v. Sims*, 1 B. & Ad. 521.

(*i*) Code, s. 27 (b). Story on Bills, s. 192 ; *Curry v. Misa*, L. R., 10 Ex. 153 ; *M'Lean v. Clydesdale Bank*, 9 App. Ca. 95.

would be in the same situation as if he had made fresh advances on the instrument (*k*); for the remedy for the previous debt is suspended till maturity of the bill or note (*l*).

A fluctuating balance may form a consideration for a bill (*m*). Where a banker's acceptances for his customer exceeded the cash balance in his hands, and accommodation acceptances were deposited by the customer with the banker as a collateral security, it was held that, whenever the acceptances exceeded the cash balance, the bankers held the collateral bills for value (*n*). Where bills or notes are deposited as a security for the balance of an account current, the successive balances form a shifting consideration for the bill. Thus, where A. and Co., bankers in the country, being pressed by the plaintiffs B. and Co., bankers in town, to whom they are indebted, to send up any bills that they can procure, transmit for account an accommodation bill accepted by the defendant; when the bill becomes due the balance is in favour of A. and Co., but the bill is not withdrawn, and afterwards the balance between the houses turns considerably in favour of B. and Co., the plaintiffs, and is so when A. and Co. become bankrupts, B. and Co. are entitled to recover against the defendant, the accommodation acceptor (*o*).

Fluctuating
balance.

(*k*) See *Percival v. Frampton*, 2 C., M. & R. 180; 3 Dowl. 748; *Foster v. Pearson*, 1 C., M. & R. 849; 5 Tyr. 255; but see *De la Chaumette v. Bank of England*, 9 B. & C. 208; 32 R. R. 643; *Valance v. Siddel*, 6 Ad. & E. 932; 2 N. & P. 78; *Poirier v. Morris*, 2 E. & B. 89; see *In re Carew*, 31 Beav. 39.

(*l*) In America the judicial decisions on this important point vary in different States. But the SUPREME COURT of the United States has gone the full length of holding that the taker of a note for a pre-existing debt has all the rights of a holder for a new consideration. *Swift v. Tyson*, 16 Peters, 1. See the state of the American authorities, Byles on Bills, 6th Amer. edition, pp. 199 et seq.

(*m*) *Pease v. Hirst*, 10 B. & C. 122; 5 M. & Ry. 88; 34 R. R. 343; *Collenridge v. Farquharson*, 1

Stark. 259; *Richards v. Macey*, 14 M. & W. 484; and for a bond, *Henniker v. Wigg*, 4 Q. B. 792; and see *Cholmley v. Darley*, 14 M. & W. 344. Prima facie the consideration for a note is the advance made or balance due at the time; and if the payee assert that it was given to secure a fluctuating balance, the burden of proof lies on him. *In re Boys*, L. R., 10 Eq. 467.

(*n*) *Bosanquet v. Dudman*, 1 Stark. 1; and see *Bolland v. Bygrave*, 1 R. & M. 271.

(*o*) *Atwood v. Crowdie*, 1 Stark. 483; see *Woodroffe v. Hayne*, 1 Car. & Payne, 600. A banker is now generally considered to be a holder for value when a negotiable instrument is transferred to him by his customer. *M'Lean v. Clydesdale Bank*, 9 App. Ca. 95, whatever be the state of the customer's account. *Ex parte Richdale*, L. R., 19 Ch. D. 409.

CHAPTER
XI.Debt of a
third person.

A subsisting debt due from a third person is a good consideration for a bill or note (*p*) payable at a future day; and so is a debt due from the defendant and a third person (*q*). If the debt of the third person is extinguished by the bill or note being taken in satisfaction, there is a good consideration, though the instrument be payable on demand.

A judgment
debt.

A judgment debt is a good consideration for a note payable at a future day; for it imports an agreement on the part of the judgment creditor to suspend proceedings on the judgment till the maturity of the note (*r*).

Compromise
of a claim.

The compromise of a claim, though really unfounded and believed to be so by the party against whom it is made, may be a good consideration for a promissory note (*s*).

Moral obliga-
tion.

A moral obligation is in general insufficient, but may, in some cases, be a consideration for a bill or note, as where

(*p*) *Popplewell v. Wilson*, 1 Stra. 264; *Coombs v. Ingram*, 4 D. & R. 211; *Sowerby v. Butcher*, 2 C. & M. 372; 4 Tyr. 320; *Garnet v. Clarke*, 11 Mod. 226; *Ridout v. Bristow*, 1 C. & J. 231; 1 Tyr. 84; 35 R. R. 710; *Wilders v. Sterens*, 15 L. J., Exch. 108; 15 M. & W. 208; and see *Lechmere v. Fletcher*, 1 C. & M. 623; *Baker v. Walker*, 14 M. & W. 465; *Walton v. Mascall*, 14 L. J., Exch. 54; 13 M. & W. 453; *Cook v. Long*, Car. & M. 510. At least, if the note be payable at a future day, for then the note amounts to an agreement to give time to the original debtor, and that indulgence to him is a consideration to the maker. *Balfour v. Sea Fire and Life Insurance Company*, 3 C. B., N. S. 300. Secus, if the original debtor is dead and has no representative. *Nelson v. Serle*, 4 M. & W. 795; reversing *Serle v. Waterworth*, 4 M. & W. 9; 6 Dowl. 684. But if the note be payable immediately, it is conceived that the pre-existing debt of a stranger could not be a consideration, unless it were taken in satisfaction, or unless credit had been given to the original debtor at

the maker's request. *Crofts v. Beale*, 11 C. B. 172.

(*q*) *Heywood v. Watson*, 4 Bing. 496; 1 M. & P. 268.

(*r*) *Baker v. Walker*, 14 M. & W. 465. So actual forbearance at request of a third party to sue, though no promise binding at law have been made not to sue, may be a good consideration for a note by that third party. *Crears v. Hunter*, 19 Q. B. D. 341, Lindley, L.J., distinguishing *Crofts v. Beale*.

(*s*) *Cooke v. Wright*, 30 L. J., Q. B. 321; *Callisher v. Bischoffsheim*, L. R., 5 Q. B. 449; 39 L. J. 181. *Miles v. New Zealand Alford Co.*, 32 Ch. D. 266; *Kingford v. Orenden*, 7 T. L. R. 13. In a recent very curious case bonds had been stolen and subsequently restored, some not being identically those taken though of the same sort; it was held that the holders must, in the absence of any evidence to the contrary, be taken to have acquiesced in the return of the bonds, and to have accepted them in satisfaction of their civil right to compel restoration which existed along with the criminal process for punishing the thief,

there once existed a legal liability, though it may have been barred by statute (*t*). "*Quisque renunciare potest juri pro se introducto.*" Thus, for example, where a bankrupt, after his bankruptcy, gave a promissory note to the plaintiff, one of his creditors, for part of his debt, it was held that the note was given on a good consideration (*u*). And a note given by the purchaser of an estate to the vendor for the purchase-money, though the contract be void by the Statute of Frauds, is made on sufficient consideration (*x*).

Between immediate parties—that is, between the drawer and acceptor, between the payee and drawer, between the payee and maker of a note, between the indorsee and indorser, the only consideration is that which moved from the plaintiff to the defendant, and the absence or failure of this is a good defence to an action. Thus, where a bill was drawn, in the regular course of trade, and delivered to the payee's agent, before the consideration was given, and the payee's agent, who was to have paid the consideration, failed, the payee could not recover against the drawer (*y*). But, between remote parties—for example, between payee and acceptor, between indorsee and acceptor, between indorsee and remote indorser, two distinct considerations, at least, must come in question: first, that which the defendant received for his liability; and, secondly, that which the plaintiff gave for his title. An action between

Cases where more than one consideration come in question.

and that they were therefore holders for a valuable consideration of all alike. *London and County Bank v. London and River Plate Bank*, 21 Q. B. D. 535; 57 L. J. 601.

(*t*) See the note to *Wennall v. Adney*, 3 B. & P. 249; 6 R. R. 780; *Eastwood v. Kenyon*, 11 Ad. & E. 438.

(*u*) *Trueman v. Fenton*, Cowp. 544; and see *Brix v. Braham*, 1 Bing. 281; 8 Moore, 261.

(*x*) *Jones v. Jones*, 6 M. & W. 84. Perhaps this case may be rested on another ground.

A majority of the Court of Exchequer have held that a bill given since the repeal of the usury laws to repay a debt with usurious interest contracted during the existence of the usury laws is binding. *Flight v. Reed*, 22 L. J., Exch. 265; 1 H. & C. 708.

(*y*) *Puget de Brus v. Forbes*, 1

Esp. 117; *Astley v. Johnson*, 29 L. J., Exch. 161; 5 H. & N. 137, where it was held that a promise to give consideration in money at a specified future time having been broken, parties liable on the bill have a right to treat the payment of money as the consideration, and not the promise to pay it. *Jeffries v. Austen*, 1 Stra. 674; *Jackson v. Warwick*, 7 T. R. 121. In *Munroe v. Bordier*, 19 L. J., C. P., 133; 8 C. B. 862, it seems to be held, that a payee who takes a bill *bonâ fide* for value from a person to whom the drawer had entrusted the bill, but who parts with it against his instructions, acquires a title.

Indeed, a payee, when he is a third person, seems to have the same title as the first indorsee of a bill payable to the drawer's own order. *Poirier v. Morris*, 2 E. & B. 89.

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remote parties will not fail unless there be absence or failure of both these considerations (*z*). And if any intermediate holder between the defendant and the plaintiff gave value for the bill, that intervening consideration will sustain the plaintiff's title (*a*).

Thus it is no defence to an action by an indorsee for value against an acceptor, that the acceptor received no value (*b*). Nor, on the other hand, that though the acceptor received value, the indorsee gave none. On the same principle, if the acceptance were without consideration, and the plaintiff, the indorsee, knew it, he, as a general rule, can recover no more than he gave for the bill (*c*); for, suppose the bill to be for 100*l.* and that the indorsee gave 60*l.* for it, if he could recover 100*l.* from the acceptor, the acceptor having recovered that sum of the drawer, the drawer might recover back 40*l.* from the indorsee as money received to the drawer's use (*d*).

Failure of
consideration.

The entire failure of the consideration has the same effect as its original and total absence. A. appointed B. his executor and gave him a promissory note, payable on demand, for 100*l.*, in consideration of the trouble he would have in the office of executor after A.'s death. B., however, died first: but his executors brought an action on the note against A. It was held, that, as the consideration for the note had totally failed, the action was not maintainable (*e*).

Notice of
absence of
consideration.

It is no defence to an action by an indorsee for value against an *accommodation* acceptor, who has received no consideration, that, at the time the plaintiff took the bill he knew the defendant had received no value (*f*); unless,

(*z*) *Robinson v. Reynolds*, 2 Q. B. 196; *Thiedemann v. Goldschmidt*, 1 De G., F. & J. 4. In *Agra and Masterman's Bank, v. Leighton*, 36 L. J., Exch. 33; L. R., 2 Exch. 56, an equitable plea stating facts amounting to a failure of both these considerations was held good.

(*a*) *Hunter v. Wilson*, 19 L. J., Exch. 8; 4 Exch. 489. Code, s. 27.

(*b*) *Collins v. Martin*, 1 Bos. & Pul. 651; 4 R. R. 752.

(*c*) *Wiffen v. Roberts*, 1 Esp. 261; 5 R. R. 737.

(*d*) *Jones v. Hibbert*, 2 Stark. 304; 19 R. R. 731. These obser-

vations do not apply to an accommodation acceptance, properly so called.

(*e*) *Solly v. Hinde*, 2 C. & M. 516; 6 C. & P. 316; 39 R. R. 830; *Wells v. Hopkins*, 5 M. & W. 7.

(*f*) Code, s. 28. *Smith v. Knox*, 3 Esp. 47; *Charles v. Marsden*, 1 Taunt. 224; *Fentum v. Pococke*, 5 Taunt. 193; 1 Marsh. 14; *Bank of Ireland v. Beresford*, 6 Dow, 237; 19 R. R. 50; and see *Popplewell v. Wilson*, 1 Stra. 264; and *Wiffen v. Roberts*, 1 Esp. 261; 5 R. R. 737; and see *Jewell v. Parr*, 16 C. B. 684; 36 L. J., Ex. 33; L. R., 2 Ex. 56.

indeed, the plaintiff took it of a person who held it for a particular purpose, and was therefore guilty of a breach of duty in transferring it to the plaintiff, and the plaintiff, at the time of taking it, was cognizant of the circumstances (*g*).

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An accommodation bill is a bill to which the accommodating party, be he acceptor, drawer, or indorser, has put his name, without consideration (*h*), for the purpose of benefiting or accommodating some other party, who desires to raise money on it and is to provide for the bill when due (*i*).

Accommodation bill, what it is.

A party who procures another to lend his acceptance, thereby engages either himself to take up the bill, or else within a reasonable time before the bill becomes due to provide the accommodation acceptor with funds for so doing, or, lastly, to indemnify the accommodation acceptor against the consequences of non-payment (*k*). And, therefore, where the drawer of a bill, accepted for his accommodation, a week before the bill became due, handed over bank notes to the accommodation acceptor, it was held that he could not himself revoke this payment, and therefore that his bankruptcy before the bill became due did not amount to a revocation (*l*).

Liability of party accommodated.

The effect of indorsing or otherwise transferring an overdue accommodation bill, will be further considered hereafter in the Chapter on TRANSFER.

Where a defendant can insist on a total want of consideration as a defence, he may also set up its partial absence or failure, as an answer *pro tanto*. Thus in an action by the drawer of a bill for 19*l.* 5*s.*, payable to his own order, against the acceptor, it appearing that the bill was accepted, for value as to 10*l.*, and as an accommodation to the plaintiff as to the residue, Lord Ellenborough held, "that although with respect to third persons the amount

Partial absence or failure of consideration.

(*g*) If a message be sent comprising facts, the communication of which would impugn the title to a bill, there is no presumption that the message was delivered; its delivery must be proved. *Middleton v. Barned*, 4 Exch. 241. See the Chapter on TRANSFER.

(*h*) Code, s. 28. As to his remedy for the costs of an action brought against him, see *post*, Chapter on ACTION.

(*i*) Bills drawn specifically the one against the other, for the

same amount, are not in this sense accommodation bills. See the Chapter on BANKRUPTCY. *Burden v. Benton*, 9 Q. B. 843; 16 L. J., Q. B. 353; see also *King v. Phillips*, 12 M. & W. 705.

(*k*) *Reynolds v. Doyle*, 1 M. & G. 753; 2 Scott, N. R. 45.

(*l*) *Yates v. Hoppe*, 9 C. B. 541. Had the payment been a fraudulent preference, it would of course have been otherwise.

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of the bill might be 19*l.* 5*s.*, yet as between these parties it was an acceptance to the amount of 10*l.* only" (*m*).

Formerly the money as to which the consideration fails must have been a specific ascertained amount, for the jury could not, in an action on a bill or note, assess by way of set-off the damages arising from a breach of contract, and the defendant was left to his cross action; but now unliquidated damages may be set up in a counter-claim (*n*). Drawer against the acceptor of a bill: the plaintiff agreed to let a house to the defendant for twenty-one years, and in consideration of 500*l.*, to be paid by three bills, to be drawn by the plaintiff and accepted by the defendant, agreed to execute a lease for that term. The bill in question, and two others, were drawn and accepted accordingly, and the defendant was immediately let into possession; but the plaintiff refused to execute the lease. It was argued, therefore, that the consideration had failed. But Lord Ellenborough, and afterwards the Court, on a motion for a new trial, held, that it was no defence to the action that the defendant was bound to pay the bills and might have his remedy on the agreement for non-execution of the lease (*o*). Where the consideration for an acceptance was goods sold, and the vendor forcibly retook possession, the consideration was held not to have failed (*p*). So, where a bill or note is given for goods sold, or work done, the price, amount, and quality of the goods, or work, cannot be disputed in an action on the bill (*q*). So, where work had been done by the plaintiff for the defendant, for which the plaintiff charged the defendant 63*l.*, and the defendant paid the plaintiff 43*l.* in money, and gave him a bill for the remaining 20*l.*; it is no defence to an action by the plaintiff against the defendant on the bill that the work done was not worth 43*l.* (*r*).

(*m*) *Darnell v. Williams*, 2 Stark. 166; 19 R. R. 694; *Barber v. Backhouse*, Peake, 61; *Clarke v. Lazarus*, 3 M. & G. 167; 2 Scott, N. R. 391; *Agra and Masterman's Bank v. Leighton*, 36 L. J., Ex. 33; L. R., 2 Ex. 56.

(*n*) Ords. XIX. rr. 2 and 3. Though this may be a good defence either wholly or *pro tanto* between the immediate parties, it can hardly be available against a holder in due course. Code, s. 38 (2).

(*o*) *Moggeridge v. Jones*, 14 East, 486; 3 Camp. 38; *Spiller v. Westlake*, 2 B. & Ad. 155; 36 R. R.

520; *Munn v. Lent*, 10 B. & C. 877; *Grant v. Welchman*, 16 East, 207; *Huff v. Browne*, 5 Price, 297; 19 R. R. 621.

(*p*) *Stephens v. Wilkinson*, 2 B. & Ad. 320; see also *Jones v. Jones*, 6 M. & W. 84; and *Lomas v. Bradshaw*, 19 L. J., C. P. 273; 9 C. B. 620.

(*q*) *Morgan v. Richardson*, 7 East, 482, n.; 3 Smith, 487; 10 R. R. 624, n.; *Tye v. Gwynne*, 2 Camp. 346; *Obbard v. Betham*, 1 M. & M. 483; *Warrick v. Nairn*, 10 Exch. 762.

(*r*) *Tricky v. Larne*, 6 M. & W. 278.

And where the amount for which the consideration failed was unliquidated, a bill in equity for an injunction to restrain an action on the bill of exchange and for an account could not be maintained (s).

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FRAUD is an artifice to deceive and injure.

FRAUD.

Fraud avoids every contract and every act. "Fraud," says the Lord Chief Baron, "cuts down everything. The law sets itself against fraud to the extent of breaking through almost every rule, sacrificing every maxim, getting rid of every ground of opposition. The law so abhors fraud that it will not allow technical difficulties of any kind to interfere to prevent the success of justice and truth (t).

If the consideration for a bill can be shown to be vitiated by fraud, of which the defendant was ignorant when he gave the bill, *and*, if the defendant has derived no benefit from the contract, but has elected to repudiate it as soon as he knew of the fraud, he has a defence to an action on the bill at the suit of the party to whom he gave it (u). Defendant gave plaintiff a promissory note for some pictures. It was proposed to prove that the sum for which the note was given infinitely exceeded the value of the pictures. Lord Ellenborough—"I will not admit the evidence for the purpose of reducing the damages, by showing that the pictures were of an inferior value; but, if you can, by the inadequacy of the value, and other circumstances, prove fraud on the part of the plaintiff, so as to show that there was no *contract at all*, the evidence will be admissible: if it fall short of that, it will be unavailing" (x). So, if a horse is warranted, a cheque is given, and the horse turn out unsound, the breach of the warranty is no answer to an action on the cheque; but if the seller knew of the unsoundness, there is fraud; there was no contract, and no action lies on the cheque, at the suit of the seller (y), if the horse be tendered back. So, if by fraudulent representations a man induces another to give him for a business more than it is worth, and take a bill in payment, he cannot recover on the bill (z). So, where the plaintiff had distrained goods of the defendant on the premises of the plaintiff's tenant, and the defendant, to get rid of the distress, accepted the

(s) *Glennie v. Imrie*, 3 Y. & C. 436.

(t) *Rogers v. Hudley*, 32 L. J., Exch. 248.

(u) *Mills v. Oddy*, 2 C., M. & R. 103.

(x) *Soloman v. Turner*, 1 Stark.

51. But it is conceived that this ruling is wrong if the defendant kept the picture.

(y) *Lewis v. Cosgrave*, 2 Taunt. 2.

(z) *Archer v. Bamford*, 3 Stark. 175.

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bill in question, it appearing that there was no rent due at the time of the distress, Best, J., left it to the jury to say, whether the plaintiff had not falsely represented to the defendant that the rent was due, in order to induce him to give his acceptance, and that, if so, the acceptance was fraudulently obtained, and the defendant was entitled to a verdict (*a*).

Fraud at
election.

But where the defendant insists on the fraud as a defence, he must altogether repudiate the contract, and retain no benefit under it (*b*).

Bills and
notes in fraud
of third
persons.

Equally unavailing is the instrument, if it were given in fraud of third persons.

An insolvent proposed to compound with his creditors, but the plaintiffs, being creditors, refused to execute the deed of composition, unless the insolvent gave them a promissory note for the residue of his debt to them. He accordingly did so without the knowledge of the other creditors, and the plaintiffs and the rest of the creditors then signed the composition deed. The note was held void, as a fraud on the other creditors (*c*). But if the insolvent pay the bill or note when due to the holder, he cannot recover back from the creditor the money so paid (*d*). And the note is equally void, if given, not by the insolvent, but by a third person. So, the note being given with a fraudulent intention, would have been void, though the composition had never been effected (*e*). And any better security than the other creditors have, though for the same amount, if taken without their knowledge, is void as a fraud on them. "The real question is," says Le Blanc, J., "whether one creditor be put in a better situation than he stipulated for with the other creditors, and it is immaterial whether that be done by receiving more money, or that which is meant to procure him more money, namely, a better security for the same sum" (*f*).

(*a*) *Grew v. Beran*, 3 Stark. 134.

(*b*) *Archer v. Bamford*, *supra*; *Lawton v. Elmore*, 27 L. J., Exch. 141; *Dawes v. Harness*, L. R., 10 C. P. 166; *Clarke v. Dixon*, E., B. & E. 148. A contract obtained by fraud is voidable at the option of the party injured, provided the other party can be remitted to his former state. *Urquhart v. Macpherson*, L. R., 3 App. Ca. 831.

(*c*) *Cockshott v. Bennett*, 2 T. R. 763; 1 R. R. 617; *Knight v. Hunt*,

5 Bing. 432; 3 M. & P. 18; 30 R. R. 692; *Bryant v. Christie*, 1 Stark. 329; and see *Took v. Tuck*, 4 Bing. 224; 13 Moore, 435.

(*d*) *Wilson v. Ray*, 10 Ad. & E. 82; 2 Per. & Dav. 253, overruling *Turner v. Hoole*, 1 D. & R., N. P. C. 27.

(*e*) *Wells v. Girling*, 1 Brod. & B. 447; 3 Moore, 79.

(*f*) *Leicester v. Rose*, 4 East, 372, overruling *Feise v. Randall*, 6 T. R. 146.

In these cases the creditor and the insolvent, though "*participes criminis*," are not "*in pari delicto*." It is oppression on one side and submission on the other. "It can never," says Lord Ellenborough, "be *par delictum* when one holds the rod and the other bows to it" (*g*).

A compounding creditor cannot split his demand, and compound for part, and afterwards sue for the residue, unless he acquaint the other creditors with his proceeding. Therefore, where the plaintiff held two bills drawn by the insolvent, both due, one for 400*l.*, the other for 156*l.* 19*s.* 10*d.*; and expecting that the acceptor would pay the first, inserted in the schedule attached to the composition deed the amount of the second only as his debt, it was decided that he could not afterwards sue the insolvent on the first bill (*h*). So, if the agreement of composition contain a stipulation that all securities shall be given up, if the compounding creditor holds bills drawn by the defendant and accepted by a third person, and he afterwards receives the amount of these bills from the acceptor, he must refund the money to the insolvent (*i*). But he may retain money so received, if the agreement of composition contained no stipulation for the surrender of securities (*k*). A creditor who holds a bill, and accepts a composition, impliedly engages that the bill is in his own hands. If, therefore, an indorsee of the bill afterwards compels the compounding debtor to pay the bill, the latter may recover the amount from the compounding creditor as money paid to his use (*l*), unless the debtor made the payment voluntarily to a holder who was a mere agent of the original creditor, and known by the debtor to be so (*m*). If the creditors of an insolvent compound with him, and take notes of hand for the amount of their respective compositions, and one creditor, in addition to his note of hand, fraudulently and clandestinely take a further security, his dealing with the insolvent is one entire

(*g*) *Smith v. Cuff*, 6 M. & S. 160; 18 R. R. 340; *Smith v. Bromley*, 2 Doug. 695, 697; *Atkinson v. Denby*, 30 L. J., Exch. 361; 31 L. J. 362, in error. The money paid at the time may be recovered back. But if a bill be given afterwards and voluntarily paid, it has been held that the money cannot be recovered back. *Wilson v. Ray*, 10 Ad. & E. 82.

(*h*) *Britten v. Hughes*, 5 Bing. 460; 3 M. & P. 77, overruling, perhaps *Payler v. Homersham*, 4

M. & Sel. 423; 16 R. R. 516; and see *Holmer v. Viner*, 1 Esp. 132; *Cecil v. Plaistow*, 1 Anst. 202. Not so where debtor omits bill from schedule. *Burelot v. Mills*, L. R., 1 Q. B. 104.

(*i*) *Stock v. Mowson*, 1 B. & P. 286.

(*k*) *Thomas v. Courtney*, 1 B. & Ald. 1.

(*l*) *Hawley v. Bererley*, 6 M. & G. 221.

(*m*) *Gibson v. Bruce*, 5 M. & G. 399.

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transaction, and he cannot recover, even on the promissory note (*n*).

So, if a man becomes surety for another for the price of goods—as, for example, by joining him in a joint and several note, and the party to whom the surety is responsible conceals from him a stipulation for an additional sum, which it is secretly agreed between himself and the principal that the principal shall pay in liquidation of an old debt, that is a fraud on the surety, and releases him from his engagement (*o*).

Where a party who has been defrauded must pay a bill or note signed by him without consideration.

But where a fraud has been practised on the maker or acceptor, an indorsee for value without notice may, nevertheless, recover against him. Thus, we have seen that though a partner fraudulently use the names of his co-partners, they will all be bound to pay an innocent indorsee (*p*). So, in an action by the indorsee against the maker of a note thirteen years old, the defendant obtained a rule *nisi* to set aside a judgment by default, on an affidavit that he the defendant was swindled out of the note. An affidavit being made on the other side, that the plaintiff took the note *bonâ fide*, and gave a valuable consideration for it, the Court held, that, *however improperly it might have been obtained*, a third person who took it fairly and gave a consideration for it, was entitled to recover, and they discharged the rule (*q*). A., by false representations, induced B. to sign his name to a blank stamped paper, which A. afterwards secretly filled up as a promissory note for 100*l.*, and induced C. to advance him 100*l.* upon it. A. was indicted for defrauding C. Held, that C. had his remedy against B. on the note, and that the fraud, therefore, not being upon C., but upon B., the indictment was not sustained by the evidence (*r*).

CONSIDERATIONS
ILLEGAL AT
COMMON
LAW.

The consideration given for a bill or note must not be illegal. It is said, that the test whether a contract be contaminated with an illegal transaction is this: Does the plaintiff require any aid from the illegal transaction to establish his case? (*s*). Considerations or contracts

(*n*) *Howden v. Haigh*, 11 Ad. & E. 1033; and see *In re Cross*, 4 De G. & S. 364.

(*o*) *Pidcock v. Bishop*, 3 B. & C. 605; 5 D. & R. 505; 27 R. R. 430. See these questions more fully discussed in the Chapter on PRINCIPAL AND SURETY.

(*p*) PARTNERSHIP, ante, p. 54.

(*q*) *Morris v. Lee*, 2 Ld. Raym. 1396; 1 Stra. 629; Bayley, 6th ed. 509; *Thiedemann v. Goldschmidt*, 1 De G., F. & J. 4.

(*r*) *R. v. Rerett*, Bury Summer Assizes, 1829, *coram* Garrow, B.

(*s*) *Simpson v. Bloss*, 7 Taunt. 246; 2 Marsh. 542; 17 R. R. 509.

are illegal, either, first, at common law ; or, secondly, by statute (*t*).

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Considerations illegal at common law are the following :— Immoral.
First, such as violate the rules of religion or morality. Though the law does not pretend to enforce religious or moral obligations as such, yet it seizes every opportunity of countenancing them : and, therefore, will not assist a man whose claim for redress is founded on their violation. “*Ex turpi causâ non oritur actio.*” “Justice,” says Lord Mansfield, “must be drawn from pure fountains.”

Thus, for example, a bond or note given in consideration of future illicit cohabitation is void, but past cohabitation is not an illegal consideration so as to avoid a deed, though it is not sufficient to support a promise (*u*). So the rent of lodgings, knowingly let for the purpose of prostitution, is an illegal consideration (*x*). A wager as to the sex of a third person is illegal, because it tends to indecent evidence, to injure the feelings of the individual, and disturb the peace of society (*y*). So a wager as to whether an unmarried woman has borne, or would have, a child (*z*). And any bill or note founded on such illegal considerations would be void.

The second sort of agreements, illegal at common law, are *such as contravene public policy.* In contraven-
tion of public
policy.

If it be merely doubtful whether an agreement be at variance with the public interest, it is not void ; it must be clearly and indubitably in contravention of public policy (*a*). A contract in general restraint of trade, as, not to carry on a particular business anywhere in England, is illegal and void ; though an agreement not to trade within a specific distance of a particular place, or not with certain customers, is good (*b*), although unlimited in point of

(*t*) The reader must not expect a complete enumeration of all the illegal considerations affecting a contract, but only such as are of most frequent occurrence, or useful as illustrating some principle.

(*u*) *Binnington v. Wallace*, 4 B. & Ald. 651 ; *Gibson v. Dickie*, 3 M. & Sel. 463 ; 16 R. R. 363 ; *Nye v. Mosely*, 6 B. & C. 133 ; 9 D. & R. 165 ; 30 R. R. 266 ; *Beaumont v. Reeve*, 15 L. J., Q. B. 141 ; 8 Q. B. 483.

(*x*) *Girardy v. Richardson*, 1 Esp. 13 ; *Howard v. Hodges*, Selw. N. P. 7th ed. 68.

(*y*) *Da Costa v. Jones*, Cowp. 729.

(*z*) *Ditchburn v. Goldsmith*, 4 Camp. 152.

(*a*) *Richardson v. Mellish*, 2 Bing. 229 ; 9 Moore, 435 ; 27 R. R. 603.

(*b*) Co. Litt. 206 b, n. 1 ; *Hunlocke v. Blacklowe*, 2 Saund. 156, n. 1 ; *Mitchel v. Reynolds*, 1 P. Wms. 181 ; 10 Mod. 130 ; *Davis v. Mason*, 5 T. R. 118 ; 2 R. R. 562 ; *Ward v. Byrne*, 5 M. & W. 548 ; *Tallis v. Tallis*, 1 E. & B. 391. Where the covenant is not to carry on business within two districts,

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time (c). A contract in general restraint of marriage is void (d), as a bond given by a widow conditional for the payment of a sum of money if she should marry again (e). And it makes no difference that the restraint is only for a limited period, as, for six years (f). An undertaking for reward to procure a marriage between two parties is void (g). A contract tending to the injury of the revenue, by evading or violating the customs and excise laws, is illegal (h). But if a trader sell goods with the *mere knowledge* that the purchaser intends to make an illegal use of them, without in any way lending his aid to the effectuation of the unlawful purpose, he may sustain an action on the contract (i). Considerations impeding the course of public justice, as, dropping a criminal prosecution for a felony or a public misdemeanor, or suppressing evidence, are illegal considerations (k). But it has been held that compounding a private misdemeanor is a good consideration for a note (l). A wager on the result of a criminal prosecution is illegal (m). A note, given after conviction to the prosecutor, for the expenses of the prosecution, the amount of which is settled by the Court, is legal (n). So, though the particulars of the arrangement are not communicated to the Court, and sanctioned by them (o). And the substitution of a good bill for a forged one, at the instance of the forger, if unaccompanied with any stipulation to stifle a prosecution for forgery, is not illegal (p). Contracts respecting the

one small and reasonable, and the other large and unreasonable, it is divisible. See *Mullan v. May*, 11 M. & W. 653; *Green v. Price*, 13 M. & W. 695; *Price v. Green*, 16 M. & W. 346.

(c) *Pemberton v. Vaughan*, 12 Q. B. 87; *Sainter v. Ferguson*, 7 C. B. 716.

(d) *Lowe v. Peers*, 4 Burr. 2225.

(e) *Baker v. White*, 2 Vern. 215.

(f) *Hartley v. Rice*, 10 East, 22; 10 R. R. 228.

(g) *Hall v. Potter*, 3 Lev. 411; *Roberts v. Roberts*, 3 P. Wms. 66; Com. Dig. Chancery, 3 Z. 8.

(h) *Biggs v. Lawrence*, 3 T. R. 454; 1 R. R. 740; *Vandyck v. Hewitt*, 1 East, 79; 5 R. R. 516; *Taylor v. Crowland Gas Company*, 10 Exch. 293.

(i) *Hodgson v. Temple*, 5 Taunt. 181; 14 R. R. 738.

(k) *Nerot v. Wallace*, 3 T. R. 17;

Fallows v. Taylor, 7 T. R. 475; *Edgcombe v. Rodd*, 5 East, 294; 7 R. R. 700. Merely refraining from prosecuting, on taking from a defaulting debtor a bill indorsed by him, is not necessarily compounding, *Flower v. Sadler*, L.R., 9 Q. B. D. 83; and the indorsee could recover against an acceptor for value, even if it were so, *ibid.* C. A., 10 Q. B. D. 573.

(l) *Drage v. Ibberson*, 2 Esp. 643; and see *Coppock v. Bower*, 4 M. & W. 361.

(m) *Erans v. Jones*, 5 M. & W. 77.

(n) *Beeley v. Wingfield*, 11 East, 46; 10 R. R. 431; see *Keir v. Leman*, 9 Q. B. 394.

(o) *Kirk v. Strickwood*, 4 B. & Ad. 421; 1 N. & M. 275; and see *Baker v. Townshend*, 1 Moore, 120; 18 R. R. 521.

(p) *Wallace v. Hardacre*, 1 Camp. 45; 10 R. R. 629.

sale of public offices are for the most part void at common law (*q*), as well as by statute. Any contract tending to cause a neglect of duty in a public officer is illegal. Thus, though the 6 Geo. 2, c. 31, authorizes parish officers to take security from the putative father of a bastard child to indemnify the parish, it is not lawful for them to take an absolute promissory note for a sum certain, and such a note is void. "It is a shocking consideration," observes Lord Ellenborough, "that by means of such a security as this, the parish officers, who have a public duty imposed upon them to take care that the father shall make a proper provision for the maintenance of the child, acquire an interest that the child should live as short a time as possible (*r*). Contracts with a public enemy are illegal; and a bill drawn by an alien enemy on his debtor here, and indorsed to the plaintiff, a British subject resident in the hostile country, cannot be recovered on, though the plaintiff do not sue till the return of peace, and though he were resident at the time of taking the bill in the hostile country (*s*). But where a British prisoner in France drew a bill on an English subject, and indorsed it to the plaintiff, then an alien enemy, it was held, that after the return of peace the plaintiff might recover (*t*). And a bill drawn by a British prisoner, in favour of an alien enemy, cannot be enforced by the payee. But by the Naturalization Act, 1870 (33 Vict. c. 14), aliens can hold both real and personal property.

Among the considerations now or formerly illegal by statute are the following:—

1. Usury. The English statutes on this subject are repealed. The decisions on them, however, are still not unimportant with a view to general principles. Moreover, usury laws exist in the United States and in almost all foreign countries. In France and Holland they have been repealed, but re-enacted.

2. Gaming considerations. The old statute 16 Car. 2, c. 7, avoided all securities, *written* or *oral*, given to secure any sum of money exceeding 100*l.* lost at play (*u*). And the 9 Anne, c. 14, expressly avoided all *written* contracts for any sum of money won at play, or by betting at play,

CONSIDERA-
TIONS
ILLEGAL BY
STATUTE.
Usury.

Gaming.

(*q*) *Richardson v. Mellish*, 2 Bing. 229; 9 Moore, 435; 27 R. R. 603.

(*r*) *Cole v. Gower*, 6 East, 110.

(*s*) *Willison v. Patterson*, 7 Taunt. 440; 18 R. R. 525.

(*t*) *Antoine v. Morshead*, 6 Taunt. 237; 1 Marsh. 558; 16 R. R. 610.

(*u*) See *Bentinck v. Connop*, 5 Q. B. 693.

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or lent for playing or betting (*x*) ; and by subjecting to the animadversion of criminal justice all winnings above 10*l.*, it impliedly avoided all contracts to enforce them also (*y*).

Both acts avoided judgments for gaming debts, but the judgments to which they refer are voluntary judgments given by the loser, and not judgments obtained by an adverse action (*z*).

Any game, whether of skill or chance, was within the acts (*a*).

But both these acts are now repealed by the 8 & 9 Vict. c. 109, s. 15, except so much of the statute of Anne as was altered by the 5 & 6 Will. 4, c. 41.

The statute 8 & 9 Vict. c. 109, makes cheating at play an offence indictable as obtaining money under false pretences (*b*). It further makes all gaming contracts, written or oral, null and void (*c*).

By the Gaming Act [1892], 55 Vict. c. 9, any promise express or implied to repay a third party money paid in respect of a gambling transaction void under the 8 & 9 Vict., or any fee or commission, is null and void, and no action lies (*d*).

Money lent to play at any illegal game cannot be recovered back by the lender. "This principle," says Lord Abinger, "was not for the first time laid down in *Cannan v. Bryce*, but that case finally settled that the repayment of money lent for the express purpose of accomplishing an illegal object cannot be enforced" (*e*).

To discuss in detail the complicated provisions of the gaming acts, and the minute distinctions which arise on them, would be to wander from the main subject.

(*x*) See also 12 Geo. 2, c. 28, and 18 Geo. 2, c. 34.

(*y*) Sect. 5 ; see *Daintree v. Hutchinson*, 10 M. & W. 85 ; *Applegarth v. Colley*, 10 M. & W. 723.

(*z*) *Lane v. Chapman*, 11 Ad. & E. 966 ; 3 P. & D. 668 ; affirmed in error, *ibid.* 980.

(*a*) *Sigell v. Jebb*, 3 Stark. 1.

(*b*) Sect. 17.

(*c*) Sect. 18. But not illegal in the sense of criminal, or in such a sense as to impose on the subsequent holder of a negotiable instrument the obligation of proving the consideration he himself gave. *Fitch v. Jones*, 24 L. J., Q. B. 293 ; 5 E. & B. 238.

See further, on the construction of the act, *Parsons v. Alexander*, 24 L. J., Q. B. 277 ; 5 E. & B. 263 ; *Coombes v. Dibble*, L. R., 1 Exch. 248 ; *Beeston v. Beeston*, 1 Ex. Div. 13 ; distinguished in *Higginson v. Simpson*, 2 C. P. Div. 77 ; *Diggle v. Higgs*, 2 Ex. Div. 422. Hence, if the transactions fall within 8 & 9 Vict. any indorsee for value can recover, but if under 5 & 6 Will. 4 only an innocent one. *Lilly v. Rankin*, 56 L. J., Q. B. 248.

(*d*) *Carney v. Plimmer*, [1897] 1 Q. B. 634.

(*e*) *Cannan v. Bryce*, 3 B. & Ald. 179 ; 22 R. R. 342 ; *M'Kinnell v. Robinson*, 3 M. & W. 434.

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Horse-racing.

Horse-races, though legalized by 13 Geo. 2, c. 19, and 18 Geo. 2, c. 34, were within the former acts against gaming (*f*). But a bet under 10*l.*, on a legal horse-race, was valid (*g*); though a bill or note given to secure it would have been void (*h*). But if the horse-race be for a sum less than 50*l.* (*i*), or above 50*l.*, but not a contest between horses running on the turf, the bet was void (*k*).

A bill of exchange or note given for a gaming debt was formerly void, even in the hands of an innocent indorsee for value, as against the party losing at play; but as against other parties it was, and still is, valid. Thus, if a bill were accepted, or a note made, for a gaming debt, no party could charge the acceptor or maker (*l*); but the drawer and indorser were and are nevertheless liable (*m*).

Innocent
indorsee.

The same rule of law applied to bills or notes given for the ransom of captured ships or cargoes (*n*); to bills or notes given by a bankrupt to his creditor to induce him to sign the bankrupt's certificate (*o*). In all these cases, as well as in the case of usury, the acts of parliament avoiding bills or notes, so far as they make the instruments absolutely void, are repealed by the 5 & 6 Will. 4, c. 41, s. 1 (*p*). This statute enacts, that in these cases bills or notes which would otherwise have been void, shall only be taken to have been given for an illegal consideration (*q*). The effect of the enactment is conceived to be, that they are good in the hands of an innocent indorsee for value against all parties (*r*).

(*f*) *Goodburn v. Marley*, 2 Stra. 1159; *Clayton v. Jennings*, 2 W. Bl. 706; *Blaxton v. Pye* 2 Wils. 309; *Shillito v. Theed*, 7 Bing. 405; 5 M. & P. 303; 33 R. R. 522; *Woolf v. Hamilton*, [1898] 2 Q. B. 337.

(*g*) *M'Alister v. Haden* 2 Camp. 438.

(*h*) 9 Anne, c. 14, s. 1.

(*i*) *Johnson v. Hann*, 4 T. R. 1; 2 R. R. 309.

(*k*) *Ximenes v. Jacques*, 6 T. R. 499; *Whalley v. Pajot*, 2 B. & P. 51; see now 3 & 4 Vict. c. 5 (which repeals 13 Geo. 2, c. 19), and 8 & 9 Vict. c. 109.

(*l*) *Bowyer v. Bampton*, 2 Stra. 1115; *Shillito v. Theed*, 7 Bing. 405; 5 M. & P. 303; 33 R. R. 522.

(*m*) *Ibid.*; *Edwards v. Dick*, 4 B. & Ald. 212; 23 R. R. 255.

(*n*) 45 Geo. 3, c. 72, s. 17.

(*o*) 12 & 13 Vict. c. 100, s. 202; *Wiggins v. Read*, 13 C. B., N. S. 220; or not to oppose the order for discharge, 24 & 25 Vict. c. 134, s. 166.

(*p*) This statute is preserved in force by 8 & 9 Vict. c. 109, s. 15, the effect of which seems to be, that a winner of stakes may recover, though a promissory note for the amount would be void. *Batty v. Marriott*, 17 L. J., C. P. 215; 5 C. B. 818.

(*q*) As to the effect of this enactment, see *Edmunds v. Groves*, 2 M. & W. 642. Both sections of the statute are prospective. *Hitchcock v. Way*, 2 N. & P. 72; 6 Ad. & El. 943; *Humphreys v. Earl of Waldegrave*, 6 M. & W. 622.

(*r*) *Hay v. Ayling*, 16 Q. B.

including the payer's bank

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[1870] 2 K.B. 346

The second section of this statute enacts, that if a loser at play gives a negotiable instrument, void under the acts against gaming, and pays the transferee, he may recover back the money so paid from the person to whom he originally gave the bill or note (s).

New security.

Even under the old law a renewed security was good, if given to an innocent indorsee before the bill fell due (t).

Stock-
jobbing.

3. Stock-jobbing. The Stock-Jobbing Act was the 7 Geo. 2, c. 8, made perpetual by 10 Geo. 2, c. 8, but now both statutes are repealed by the 23 & 24 Vict. c. 28 (u). The principal provisions of the first-mentioned statute were as follow (x) :—

(1.) Putting upon stock was prohibited ; that is, a contract to pay or receive a certain sum of money for the liberty to deliver or not to deliver, or to accept or refuse a certain quantity of stock at a fixed price on a given day. Such a contract was declared void, the money paid was made recoverable, and both parties were subject to the penalty of 500*l.*, unless the money paid were recovered or refunded.

(2.) The payment of money, instead of delivering or receiving stock, subjected to the penalty of 100*l.*

(3.) It was supposed that contracts to buy or sell stock, of which the seller was not at the time possessed, subjected both parties to the penalty of 500*l.* But such contracts were afterwards held to be legal (y).

It was formerly held, that money expended by another person in settling a stock-jobber's differences for him, or

423. See *Fitch v. Jones*, 5 E. & B. 238. But see *Goldsmid v. Hampton*, 5 C. B., N. S. 94. In the case of a bankrupt it was expressly so enacted, 24 & 25 Vict. c. 134, s. 166.

(s) But it was no defence to an action against an acceptor that the bill was given for bets on horse races, made by the drawer as his agent, and paid without his request. *Oulds v. Harrison*, 10 Exch. 572. And see the recent case of *Read v. Anderson*, 13 Q. B. D. 779, which now would fall within the act of 1892. In *Crawley v. White*, 78 L. T. N. S. 167, the learned Judge held the facts not to come within the 5 & 6 Will. 4, c. 41, s. 2.

(t) *George v. Stanley*, 4 Taunt. 683.

(u) Quære, whether some cases of gaming in stock may not have been within 9 Anne, c. 14, and be not now within 8 & 9 Vict. c. 109. See *Thacker v. Hardy*, 4 Q. B. D. 685 ; *In re Giere*, [1899] 1 Q. B. 794. Money deposited as "cover" may be recovered, *Universal Stock Exchange v. Strachan*, [1896] Ap. Ca. 166 ; *Ex parte Waud*, [1898] 2 Q. B. 383.

(x) Transactions in foreign stock were not within this statute, *Henderson v. Bise*, 3 Stark. 158 ; *Wells v. Porter*, 2 Bing. N. C. 723 ; *Oakley v. Rigby*, 2 Bing. N. C. 732 ; nor railway shares, *Hewitt v. Price*, 4 M. & G. 355 ; *Williams v. Trye*, 18 Beav. 366.

(y) *Mortimer v. McCullan*, 7 M. & W. 20 : affirmed, 9 M. & W. 636.

money lent him to settle them with, could be recovered (z). But it was afterwards settled, that as the fifth section of the act 7 Geo. 2, c. 8, prohibited expressly the payment of money for the arrangement of differences, a person paying differences for another, or lending him money to pay them himself, advanced money for an illegal purpose, and could not recover it back (a).

The following cases relating to bills were decided on this statute :—The defendant employed a broker (b), to pay differences for him, and after they were settled a dispute arose between them as to the amount of money so paid by the broker. The case was referred to the plaintiff and three other arbitrators, who awarded the sum of 306*l.* 12*s.* 6*d.* to be due from the defendant to his broker. The broker then drew on the defendant for 100*l.*, part of this sum ; the defendant accepted the bill, and the broker indorsed it to the plaintiff. It was held that the bill was void as between the broker and the defendant, and the plaintiff having been an arbitrator, had notice of the illegal consideration, and stood in the same situation as the broker (c). Where a broker had settled differences for his principal *in omnium*, had taken his principal's acceptance for the amount, and indorsed the bill when overdue, it was held, first, that jobbing *in omnium* was within the act ; secondly, that the bill was void in the hands of the broker ; and thirdly, that having been indorsed when overdue, it was also void in the hands of the indorsee, as against the acceptor (d). A stock-jobber gave his broker a promissory note for differences paid for him by his broker, and the broker indorsed it overdue to the plaintiffs. The plaintiffs threatened to sue the defendants upon the note, but they consented to give up the note, and take the defendants' bond instead, knowing, at the time they took the bond, that the note had been given on an illegal consideration. Held, that they could not originally have recovered upon the note, nor afterwards upon the bond (e). Where a man gave his acceptance for

(z) *Faikney v. Reynous*, 4 Burr. 2069 ; *Petre v. Hannay*, 3 T. R. 418.

(a) *Cannan v. Bryce*, 3 B. & Ald. 179 ; 22 R. R. 342 ; *M'Kinnell v. Robinson*, 3 M. & W. 434.

(b) Stockbrokers are within the statutes 6 Anne, c. 16, s. 4, and 57 Geo. 3, c. 40, *Clarke v. Powell*, 4 B. & Ad. 846 ; 1 N. & M. 492, by which brokers are prohibited under a penalty from acting in London without admission by the

mayor and aldermen. For the condition of the bond given by brokers, and the oath taken by them, see *Kemble v. Atkins*, Holt, N. P. C. 427 ; 17 R. R. 658.

(c) *Steers v. Ashley*, 6 T. R. 61 ; 1 Esp. 166.

(d) *Brown v. Turner*, 7 T. R. 630 ; 2 Esp. 631.

(e) *Amory v. Merryweather*, 2 B. & C. 573 ; 4 D. & R. 86 ; 26 R. R. 467.

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differences owing from himself to the drawer, and the drawer indorsed the bill for value without notice, it was held that the indorsee might recover against the drawer (*f*). And as the statute did not expressly avoid securities given for differences, it should seem, the indorsee might have recovered against the acceptor (*g*). Where a man sold stock of which he was not possessed, and afterwards bought it and transferred it to the vendee, he might, notwithstanding the statute, maintain an action for the price (*h*). This act was to be construed strictly (*i*).

Other considerations illegal by statute.

Besides the cases which have been mentioned, there are many other instances of securities expressly avoided by the legislature: as, gaming policies on ships or lives (*k*); sale of an office (*l*); a stipulation with a sheriff for ease or favour (*m*); a security whereby a creditor of a bankrupt who has proved his debt is to receive more than others (*n*); or to receive anything for signing the bankrupt's certificate (*o*); or for not opposing the order for his discharge (*p*); a security given by a man for a debt from which he has been discharged by the Insolvent Debtors' Act (*q*). And to these (except where the statute (*r*) gives a title to a holder for value without notice), the same general rules apply as to securities given for a gaming debt, before that statute.

Many cases there are, also, in which, though the transaction is prohibited by the legislature, the security is not expressly avoided. In such instances, the bill is void in the hands of parties to the illegal transaction, or cognizant thereof, but not in the hands of a *bonâ fide* indorsee for value, before the bill is due, without notice of the

(*f*) *Day v. Stuart*, 6 Bing. 109; 3 M. & P. 334.

(*g*) See Mr. J. Holroyd's observations in *Broughton v. Manchester Water Works Company*, 3 B. & Ald. 10; 22 R. R. 278.

(*h*) *Mortimer v. M'Callan*, 7 M. & W. 20; affirmed, 9 M. & W. 636.

(*i*) *Wells v. Porter*, 2 Bing. N. C. 730; *Hewitt v. Price*, 4 M. & G. 355.

(*k*) 19 Geo. 2, c. 37; 14 Geo. 3, c. 48.

(*l*) 5 & 6 Edw. 6, c. 16; 49 Geo. 3, c. 126; 53 Geo. 3, c. 129.

(*m*) 23 Hen. 6, c. 9.

(*n*) 12 & 13 Vict. c. 106, s. 268; *Rose v. Main*, 1 Bing. N. C. 357;

1 Scott, 127; *Davis v. Holding*, 1 M. & W. 159.

(*o*) 12 & 13 Vict. c. 106, s. 202; *Birch v. Jerris*, 3 C. & P. 379; *Taylor v. Wilson*, 5 Exch. 251; *Hankey v. Cobb*, 1 Q. B. 490; *Smith v. Saltzman*, 9 Exch. 235.

(*p*) 24 & 25 Vict. c. 134, s. 166.

(*q*) *Evans v. Williams*, 1 C. & M. 30; 3 Tyrw. 266; *Ashley v. Killick*, 5 M. & W. 509; and see *Kernot v. Pittis*, 2 E. & B. 421; *Humphreys v. Willing*, 32 L. J., Ex. 33; 1 Hurl. & Colt. 7.

(*r*) 5 & 6 Will. 4, c. 41, s. 1; 24 & 25 Vict. c. 134, s. 166.

illegality (*s*). The 24 Geo. 2, c. 40, s. 12, prohibits persons from recovering a debt incurred by sale of spirituous liquors, in less quantities than of the value of 20*s.*; and, where part of the consideration for a bill was for spirituous liquors, within the statute, and part for money lent, the bill was wholly void in the hands of the payee (*t*). But where the defendant was indebted to the plaintiff for board and lodging, and for spirituous liquors in quantities of less value than 20*s.*, and having made the plaintiff several unappropriated payments, gave a promissory note for the balance, it was held that the plaintiff might appropriate these payments to the discharge of his demands for spirituous liquors, and that the consideration of the note being thus purged of those items, the plaintiff might recover on the note (*u*).

So a bill of exchange accepted to secure payment of money taken at the doors of an unlicensed theatre, is void (*x*) in the hands of the payee, who knew the theatre to be unlicensed. Therefore, also, as the statute 57 Geo. 3, c. 99, prohibits spiritual persons from trading, it was held, that a joint-stock banking company, in which a beneficed clergyman held shares, could not sue as indorsee on a bill of exchange (*y*). In consequence of this decision, an act of parliament, 1 Vict. c. 10 (continued by 4 Vict. c. 14), was passed to obviate the inconvenience.

But a note given for the amount of an attorney's bill not delivered pursuant to 6 & 7 Vict. c. 73, is good (*z*).

So where a member of a company not registered, and therefore illegal under 25 & 26 Vict. c. 89, s. 4, had given a promissory note to secure advances for the purposes of the company made to him by it, it was held that the consideration for the note being vitiated by illegality, it could not be enforced (*a*).

(*s*) *Wyat v. Bulmer*, 2 Esp. 538. See, too, *Begbie v. Levi*, 1 C. & J. 180.

(*t*) *Scott v. Gillmore*, 3 Taunt. 226; 12 R. R. 641. Quære tamen, see *Crookshank v. Rose*, 1 M. & Rob. 100; 5 C. & P. 19; 38 R. R. 788. Where two sorts of spirits had been supplied at one time, the amount of each sort being under 20*s.*, but of both together above 20*s.*, it was held that the value of both was recoverable. *Owens v. Porter*, 4 C. & P. 367.

(*u*) *Crookshank v. Rose*, 1 M. &

Rob. 100; 5 C. & P. 19; 38 R. R. 788. The 24 Geo. 2, c. 40, s. 12, is partially repealed by the 25 & 26 Vict. c. 38, as to spirituous liquors consumed elsewhere than on the premises where sold.

(*x*) *De Begnis v. Armistead*, 10 Bing. 107; 3 M. & P. 511; 38 R. R. 406.

(*y*) *Hull v. Franklin*, 3 M. & W. 259; 1 Har. & W. 8.

(*z*) *Jeffreys v. Evans*, 14 M. & W. 210.

(*a*) As between those parties, *Jennings v. Hammond*, L. R., 9 Q. B. D. 225; nor by a subsequent

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Remedy of
agent against
principal.

Notice of
fraudulent or
illegal con-
sideration.

Illegality of
consideration
when
judgment
recovered.

Illegality of
part of the
consideration.

Renewal of
bill given on
illegal con-
sideration.

An agent employed to make an illegal contract, and discharging at the request of his principal a claim thereon, could recover against his principal (*b*).

It is no defence that the plaintiff being a transferee of a bill or note had notice of a fraudulent or illegal consideration, if he can deduce title from a prior party not shown to have had any such notice (*c*).

A judgment recovered by default will not be set aside, on the ground of illegality in the consideration, unless the defendant can affect the plaintiff with knowledge of that fact; but the Court has permitted him to try that in an issue (*d*).

If part of the consideration of a bill or note be fraudulent or illegal, the instrument is vitiated altogether (*e*). Where the parties have woven a web of fraud or wrong, it is said to be no part of the duty of Courts of Justice to unravel the threads.

If a bill originally given upon an illegal consideration be renewed, the renewed bill is also void (*f*), unless the amount be reduced by excluding so much of the consideration for the original bill as was illegal (*g*).

And if a bill or note be originally without any consideration, and be given up, another bill between the same

indorsee without value and with notice, being a trustee for the company, *Shaw v. Benson*, 11 Q. B. D. 563. But see *Peat v. Fowler*, 55 L. J., Q. B. 271.

(*b*) *Knight v. Cambers*; *same v. Fitch*, 15 C. B. 562 and 566; 24 L. J. 121 and 122; *Rosewarm v. Billing*, 15 C. B., N. S. 316; 33 L. J. 55. But a gaming contract such as was this being now void under 8 & 9 Vict. c. 109, see *In re Giere*, [1899] 1 Q. B. 794, the Gaming Act [1892] would bar the action.

(*c*) *Masters v. Ibberson*, 18 L. J., C. P. 348; 8 C. B. 100. Code, s. 29 (3).

(*d*) *George v. Stanley*, 4 Taunt. 683; *Darison v. Franklin*, 1 B. & Ad. 142; 35 R. R. 255.

(*e*) *Robinson v. Bland*, 2 Burr. 1077; *Scott v. Gillmore*, 3 Taunt. 226; 12 R. R. 641; *Crookshank v.*

Rose, 5 Car. & P. 19; 1 M. & Rob. 100; 38 R. R. 788; Story on Promissory Notes, s. 190; *Williams v. Bulmore*, 33 L. J., Chanc. 461; *Lound v. Grimwade*, 39 Ch. D. 605; 57 L. J. 125.

(*f*) *Chapman v. Black*, 2 B. & Ald. 588; 21 R. R. 407; *Wynne v. Callander*, 1 Russ. 293; *Preston v. Jackson*, 2 Stark. 237.

(*g*) *Ibid.*; and see *Hubner v. Richardson*, Bayley, 6th ed. 527. In some cases, where there has been a change of parties, the defendant must plead the whole agreement on which the renewed bill was given. *Boulton v. Coghill*, 1 Bing. N. C. 640. In others, where the parties are the same, it is sufficient to plead the illegality attaching to the original bill, without mentioning the substitution. *Hay v. Ayling*, 20 L. J., Q. B. 171; 16 Q. B. 423.

parties being substituted for it, the giving up the first bill is no consideration for the second, and both alike are incapable for want of consideration of being enforced between the immediate parties, though it would be otherwise at the suit of a holder in due course (*h*).

(*h*) *Sonthall v. Rigg*, 11 C. B. 481. A substituted bill or note is in general held under the same title as the one it replaces. *Lec*

v. Zagury, 8 Taunt. 114 ; 19 R. R. 476 ; but see *Flight v. Read*, 32 L. J., Ex. 265 ; 1 H. & C. 703.

CHAPTER XII.

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AND NOTES.

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CHAPTER
XII.

Division of
the subject.

IN examining the subject of the transfer of bills and notes, let us consider, first, what bills are transferable; secondly, the modes of transfer; thirdly, the nature and extent of an indorser's liability; fourthly, the rights of an indorsee; fifthly, the liability of a person transferring by delivery; sixthly, the rights of a transferee by delivery; seventhly, transfer under peculiar circumstances; eighthly and lastly, when the Court will restrain a transfer.

First, as to what bills or notes are transferable. All bills, cheques, or notes are negotiable, and, as it should seem, even without the words "order or bearer," unless they contain words prohibiting transfer, or indicating an intention that they should not be transferable. No precise form of words is given in the Code to constitute a restrictive drawing (save in the case of cheques), but words are given

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Effect of indorsement of a bill not negotiable.

that form a restrictive indorsement, s. 35 (1), and they probably would be equally applicable to a drawing (a).

But if, nevertheless, the payee do indorse a bill not negotiable, he is liable on his indorsement to his indorsee (b). For every indorser of a bill is in the nature of a new drawer (c). If a note, however, were not originally negotiable, it seems to have been considered by the Court of Common Pleas that the first drawing exhausts the stamp, and that the indorsee cannot acquire a right, without a new stamp (d), which cannot by law be impressed. If the declaration on a bill indorsed in blank, but not originally negotiable, or not indorsed by the payee, state that the defendant, the indorser, drew and indorsed the bill, payable to his order, it will upon evidence be open to the double objection that the same act is treated both as a drawing and an indorsement, which it cannot be, and that the bill is described as made payable to order, whereas the effect of the blank indorsement is to make it payable to bearer (e).

Of a note not negotiable.

It has been held that the indorsement of a note (whether originally negotiable or not), by one to whom it has not been transferred, will not make the indorser liable on his indorsement (f). For though every indorser of a bill may

(a) Since a bill or note payable to C.—to C.'s order—or to C. or order, is in either case payable to C. or his order at his option, and if he indorse in blank, payable to bearer, it seems to follow that the mere absence of the words "order or bearer" in no wise hinders the negotiability of the bill or note. Code, s. 8 (3), (4), and (5). They also are not recognized as a material part, alteration of which may avoid the instrument. Sect. 64. In a "not negotiable" cheque a transferee does not acquire, as we have seen, a new and independent title, but stands in the transferor's shoes.

(b) *Hill v. Lewis*, 1 Salk. 132 ; *Smallwood v. Vernon*, 1 Stra. 478 ; *Gwinnell v. Herbert*, 5 Ad. & E. 436 ; *Burmester v. Hogarth*, 11 M. & W. 97 ; *Penny v. Innes*, 1 C. M. & R. 439 ; 5 Tyr. 107. But

see *Plimley v. Westley*, *infra*, where the Court seemed to think that the stamp laws might interpose an obstacle.

(c) And therefore a blank indorsement on a bill not negotiable has been held to operate as the drawing of a bill payable to bearer. *Matthews v. Bloram*, 33 L. J., Q. B. 209. See *Allen v. Walker*, 2 M. & W. 317 ; 5 Dowl. 460. *Matthews v. Bloram* was doubted in *Steele v. McKinlay*, L. R., 5 Ap. Ca. 754. The liability incurred by such a signature is probably that of an indorser. Code, s. 56.

(d) *Plimley v. Westley*, 2 Bing. N. C. 249 ; 2 Scott, 423 ; 1 Hodges, 324. The Code does not touch the Stamp Acts. See s. 97.

(e) *Burmester v. Hogarth*, 11 M. & W. 97.

(f) *Gwinnell v. Herbert*, 5 A. & E. 436 ; 6 N. & M. 723. The

be treated, without inconvenience, as a new drawer or maker (for in that character he still requires notice of dishonour), yet an indorser of a note cannot be treated as a drawer or maker of the *note*, without altering his situation for the worse, and depriving him of the right to notice of dishonour.

'The words *to his order* or *to bearer*, if omitted by mistake, may be afterwards inserted, without vitiating the instrument either at common law, under the Stamp Act, or under the provisions relating to alteration (*g*).

Subsequent
insertion of
words
creating
negotiability.

Whether a bill or note be negotiable or not is a question of law (*h*).

Secondly, as to the modes of transfer.

MODES OF
TRANSFER.

A bill or note is negotiated when it is transferred in such a manner as to constitute the transferee the holder of it.

A bill payable to bearer is negotiated by delivery.

A bill payable to order is negotiated by the indorsement of the holder completed by delivery (*i*).

Where the holder of a bill payable to his order transfers it for value without indorsing it, the transferee has only the transferor's title, but has the right to have the indorsement made (*k*).

Code, s. 56, now makes a stranger signing a bill or note otherwise than as drawer, or acceptor or maker, liable as indorser to a holder in due course; hence it seems hardly open to doubt that if the note be negotiable, such a signer would be held liable, though, if the note were originally not negotiable, the objection under the Stamp Act would still remain. See, too, Story on Promissory Notes, s. 138; and *Ex parte Yates*, 27 L. J., Bkcy. 9.

(*g*) *Kershaw v. Cox*, 3 Esp. 246. See the Chapter on ALTERATION.

(*h*) *Grant v. Vaughan*, 3 Burr. 1516.

(*i*) Delivery may be actual or constructive, *i.e.*, to an agent. Code, s. 2. Delivery may, in certain cases, be presumed. Thus if a banker hold as agent a bill transferable by delivery, a direction given to him by the owner to hold it for another would, it is conceived, be a sufficient transfer

by delivery; so, too, if a holder make over by deed, or perhaps by any valid written or even verbal contract, a bill or note transferable by delivery, though without actually delivering it, he would thenceforth hold it as agent for the transferee. Notification of the fact of acceptance, by the acceptor to, or according to the directions of, the person entitled to the bill, makes the acceptance complete and irrevocable, as though there had been actual delivery. Code, s. 21. Delivery from every party is conclusively presumed in favour of a holder in due course, sect. 21 (2) b; and *prima facie* where maker or acceptor, drawer or indorser, has parted with the possession of the bill or note. Sect. 21 (3).

(*k*) Sect. 31 (4). By sect. 14 of the Judicature Act, 1884, 47 & 48 Vict. c. 61, he can compel indorsement by obtaining an order or judgment for that pur-

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Executors or administrators having to indorse, may stipulate to pay out of the estate only ("so far as assets only" is believed to be a common form of doing so), or in any other manner expressly negative their personal liability (*l*).

What is required in an indorsement.

An indorsement in order to be operative must be written on the bill and signed; the simple signature of the indorser suffices (*m*). It is not essential to the validity of an indorsement that it should be on the back of a bill or note: it may equally well be on the face (*n*).

Allonge.

There is no legal limit to the number of indorsements, and if there be no room to write them on the bill, the supernumerary indorsements may be written on a slip of paper annexed to the bill, called an "allonge," or partly on both. An allonge is thenceforth part of the bill, and requires no additional stamp. Allonges are not so often met with in this country as in countries where the Code Napoleon is in force, which requires an indorsement to express the consideration, holding it to be otherwise merely a procuration. The German and other more modern Codes do not require this.

On a copy.

An indorsement may also be written on a "copy" of a bill, if issued in any country where copies are recognized (*o*).

Of entire bill or note.

An indorsement must be of the entire bill or note; there cannot be a partial indorsement (though there can be a partial acceptance, in which case an indorsement of the bill so accepted for part of the sum would doubtless be good); nor one to two or more indorseees severally (*p*).

By a plurality of holders.

Where a bill or note is payable to two or more payees or indorseees, not being partners, all must indorse, unless one have authority to indorse for all (*q*).

pose, and on failure of compliance, have it made by the hand of a nominee of the Court. An order of the Court restraining negotiation includes one partly completed. *Day v. Longhurst*, 62 L. J. Ch. 334.

(*l*) Sect. 31 (5). See ante, p. 67.

(*m*) Sect. 32 (1). The mark of a person who cannot write is a sufficient indorsement, *George v. Surrey*, M. & M. 516; 31 R. R. 755, if witnessed and proved.

(*n*) *R. v. Bigge*, 1 Stra. 18; *Ex parte Yates*, 27 L. J., Bkcy. 9; *Yarborough v. Bank of England*, 16 East, 6; 14 R. R. 272.

(*o*) Code, s. 32 (1).

(*p*) Code, s. 32 (2). As there may be alternative payees, sect. 7, so presumably there may be alternative indorseees, sect. 34 (3), in which case the indorsement of either should suffice, if good in other respects.

(*q*) Sect. 32 (3). *Carrick v. Vickery*, 2 Doug. 653 (*n*).

Where in a bill payable to order the payee or indorsee is wrongly designated, or his name mis-spelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature (*r*).

CHAPTER
XII.Mis-spelt
payee or
indorsee.

Where there are two or more indorsements on a bill or note, they are *primâ facie* deemed to have been made in the order in which they stand (*s*).

Presumption
as to time of.

Except where an indorsement bears date after the maturity of the bill, every negotiation is *primâ facie* deemed to have been effected before the bill was overdue (*t*).

Indorsements are of two sorts : an indorsement *in blank*, or, as it is sometimes termed, a *blank* indorsement, and an indorsement *in full* or *special* indorsement. No particular form of words is essential to any indorsement. A *blank* indorsement is made by the mere signature of the indorser (usually and properly, though not necessarily) on the back of the bill ; its effect is to make the instrument payable to bearer (*u*).

Blank in-
dorsement.

"An indorsement in blank," says Lord Ellenborough, "conveys a joint right of action to as many as agree in suing on the bill" (*x*). Therefore, where three persons separately indorsed a bill for the accommodation of the drawer, which was afterwards dishonoured and returned to them, and they paid the amount among them, it was held, that they might bring a joint action against a previous indorser (*y*). But where a bill of exchange was, by the direction of the payee, indorsed in blank, and delivered to A., B. & Co., who were bankers, on the account of the estate of an insolvent, which was vested in trustees for the benefit of his creditors, Lord Ellenborough held, that A. and B., two of the members of this firm, and also trustees, could not, conjointly with another trustee who was not a member of the firm, maintain an action against the indorser, without some evidence of the transfer of

(*r*) Sect. 42 (4). *Leonard v. Wilson*, 2 C. & M. 589 ; 4 Tyr. 415 ; 39 R. R. 855.

(*s*) Sect. 32 (5). But this may be rebutted by evidence, *Macdonald v. Whitfield*, L. R., 8 Ch. App. 733, where successive indorsers of a note were allowed to show that as between themselves they were not principal and surety, but co-sureties.

(*t*) *Parkin v. Moon*, 7 C. & P. 408 ; *Lewis v. Parker*, 4 A. & E. 838 ; *Cripps v. Davis*, 12 M. & W. 165. Code, s. 36 (4).

(*u*) *Peacock v. Rhodes*, Doug. 611 ; *Francis v. Mott*, Doug. 612. Code, s. 8 (3), and s. 34 (1).

(*x*) *Ord v. Portal*, 3 Camp. 239.

(*y*) *Low v. Copestake*, 3 C. & P. 300.

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the bill to them, as trustees, by the firm, by delivery or otherwise (z).

Special
indorsement.

An indorsement *in full*, besides the signature of the indorser, expresses in whose favour the indorsement is made. Thus, an indorsement in full, by A. B., is in this form: "Pay Mr. C. D., or order. A. B." The signature of the indorser being subscribed to the direction, its effect is to make the instrument payable to C. D. or his order only; and, accordingly, C. D. cannot transfer it otherwise than by indorsement. The omission of the words, "*or order*," is not material in a special indorsement; for the indorsee takes it with all its incidents, and, among the rest, with its negotiable quality, unless it contain words prohibiting transfer (a).

Conversion of
blank into -
special
indorsement.

When a bill has been indorsed in blank any holder may convert the blank into a special indorsement, by writing above the indorser's signature a direction to pay the bill to, or to the order of, himself or some other person (b).

If a bill indorsed in blank, were afterwards indorsed in full, it was formerly as against the acceptor, the drawer, the payee, the blank and all previous indorsers, payable to bearer; though as against the special indorser himself, title must have been made through his indorsee (c).

When a holder converts a blank indorsement into a special one in favour of a stranger, he incurs no liability as indorser (d). If the holder turn a blank indorsement into a special one in his own favour, that is an election to take the bill or note as indorsee, and he cannot afterwards be considered as merely servant or assignee of the indorser (e).

Delivery
necessary.

Every contract on a bill or note, whether it be the drawer's, the acceptor's or maker's, or the indorser's, is incomplete and revocable, until completed by delivery. Delivery means transfer of possession, actual or constructive, from one person to another (f).

(z) *Machell v. Kinnear*, 1 Stark. 499.

(a) Code, s. 35 (2); *Moore v. Manning*, Com. Rep. 311; *Acheson v. Fountain*, 1 Stra. 557; *Eddie v. East India Company*, 2 Burr. 1216; 1 W. Bl. 295; *Cunliffe v. Whitehead*, 3 Bing. N. C. 829; 5 Scott, 31; 6 Dowl. 63; *Guy v. Lander*, 6 C. B. 336.

(b) *Hirschfield v. Smith*, L. R.,

1 C. P. 340; Code, s. 34 (4).

(c) *Smith v. Clarke*, Peake, 225; *Walker v. M'Donald*, 2 Ex. 527; 17 L. J., Ex. 377. But now the last indorsement governs the instrument. Code, s. 8 (3).

(d) *Vincent v. Horlock*, 1 Camp. 442; 10 R. R. 424; Code, s. 23.

(e) *Clark v. Pigott*, 12 Mod. 193; 1 Salk. 126.

(f) Code, ss. 21, 84; *Cox v.*

Delivery must be made by or under the authority of the party contracting on a bill or note ; it may be conditional only, and not for the purpose of transferring the property in a bill or note, but only as between immediate parties, or remote parties other than a holder in due course (*g*).

CHAPTER
XII.Requisites of
valid delivery.

If the bill or note be in the hands of a holder in due course, a valid delivery by all prior parties so as to make them liable to him is conclusively presumed.

Presumption
as to.

When the bill or note is no longer in the possession of the party signing it, a valid and unconditional delivery by him is presumed until the contrary appear (*h*).

Constructive delivery, or delivery to the agent or servant of the intended transferee is equally binding : thus where A. specially indorsed certain bills to B., sealed them up in a parcel, and left them in charge with his own servant to be given to the postman, it was held that the special indorsement did not transfer the property in the bills till delivery, and that delivery to the servant was not sufficient, though it would have been otherwise had the delivery been made to the postman (*i*). But where A. and B. carried on business in partnership, and being indebted to C., A., who acted as C.'s agent, with the concurrence of B., indorsed a bill in the name of the firm, and placed it amongst the securities which he held for C., but no communication of the fact was made to C. : it was held to be a good indorsement by the firm to C. (*k*).

Hence the word *indorse* in the pleadings in an action on a bill or note imports a delivery and transfer to the indorsee, so as to confer title. Therefore, under a traverse of the indorsement the defendant may show that the circumstances were such as that the indorsement did not effect a legal delivery of the bill to the indorsee (*l*), whether the actual delivery were to a third person, or to the indorsee himself (*m*).

Troy, 5 B. & Ald. 474 ; 1 D. & R. 38 ; 24 R. R. 460 ; *Chapman v. Cottrell*, 34 L. J., Ex. 186.

(*g*) Code, s. 21 (2) ; *Pike v. Street*, 1 M. & M. 226.

(*h*) Sect. 21 (3) ; *Barendale v. Bennett*, 3 Q. B. D. 525.

(*i*) *R. v. Lambton*, 5 Price, 428 ; 19 R. R. 645 ; *Adams v. Jones*, 4 P. & D. 174 ; 12 Ad. & El. 455 ; *Brind v. Hampshire*, 1 M. & W. 369 ; Bayley on Bills, 6th ed. 137. By the French post rules, a letter once posted may be recalled ; to recall a letter is a revocation of

the delivery of an indorsed bill contained in it, even if by mischance the letter proceed. *Cote v. Dereze*, L. R., 9 Chan. Ap. p. 27.

(*k*) *Lysaght v. Bryant*, 9 C. B. 46.

(*l*) *Marston v. Allen*, 8 M. & W. 494 ; *Adams v. Jones*, 12 Ad. & El. 455 ; *Lloyd v. Howard*, 20 L. J., Q. B. 1 ; 15 Q. B. 995 ; see *Robinson v. Little*, 18 L. J., Q. B. 29 ; *Green v. Steer*, 1 Q. B. 707 ; *Denton v. Peters*, L. R., 5 C. B. 475.

(*m*) *Bell v. Lord Ingestre*, 19

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By party incompetent to contract.

As has already been noticed, where a bill is drawn, or a bill or note indorsed by an infant, or a corporation not having the power to incur liability on a bill or note, the instrument is available in the hands of the holder against all the other parties, but not against the infant or corporation (*n*).

Conditional indorsement.

The drawing must be unconditional, while the acceptance may be conditional; and an indorsement is not void because it purports to be conditional, though the payer may disregard it, and payment to the indorsee is valid whether the condition be fulfilled or not (*o*).

LIABILITY OF INDORSER.

Thirdly, as to the liability of an indorser.

Every indorser of a bill is in the nature of a new drawer (*p*); and is liable to every succeeding holder in default of acceptance or payment by the drawee.

Contract of the drawer.

The drawer of a bill contracts that, on due presentment, it shall be accepted and paid according to its tenour; and that in case of dishonour he will compensate the holder, or any indorser who has to pay it, if notice of dishonour be duly given; he is also estopped from denying to a holder in due course the existence of the payee and his then capacity to indorse.

Contract of the indorser.

The indorser makes a similar contract, and promises in the same way to compensate the holder or any subsequent indorser; he is estopped from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature, and of all previous indorsements; is estopped from denying to his immediate and any subsequent

L. J., Q. B. 71; 12 Q. B. 317; and see *Barber v. Richards*, 6 Exch. 63; *Lloyd v. Howard*, 15 Q. B. 995.

(*n*) *Lebel v. Tucker*, 8 B. & S. 833; *Smith v. Johnson*, 3 H. & N. 222; Code, s. 22 (2); ante, p. 81. As we have seen, if the acceptance be by a person incapable of contracting, the holder may treat it as the drawer's promissory note. Sect. 5 (2).

(*o*) Code, s. 33. Where a bill was accepted after having been conditionally indorsed, and was paid in disregard of the condition, the acceptor was formerly held liable to pay again on the fulfil-

ment of the condition. *Robertson v. Kensington*, 4 Taunt. 30; *Savage v. Aldren*, 2 Stark. 232; 19 R. R. 707. It seems that a bill or note cannot be indorsed with a condition that, in a certain event, the indorsee shall not have power to indorse. *Soares v. Glyn*, 14 L. J., Q. B. 313; 8 Q. B. 24, i.e., an indorsement may be conditional, or restrictive, but not conditionally restrictive.

(*p*) *Penny v. Innes*, 1 C., M. & R. 441; 5 Tyrw. 107; see *Allen v. Walker*, 2 M. & W. 317; 5 Dowl. 460; 1 M. & W. 44; *Suse v. Pompe*, 30 L. J., C. P. 75; 8 C. B., N. S. 538.

indorsee, that the bill was, at the time of his indorsement, a valid and subsisting bill, and that he had then a good title thereto (*q*).

But a man may indorse a bill without incurring personal responsibility in several ways. How declined.

First, by expressing in his indorsement that it is made with this qualification, that he shall not be liable on default of acceptance or payment by the drawee. Such qualified indorsement will be made by annexing in French the words "*sans recours*," or in English, "*without recourse to me*," or any equivalent expression (*r*). By indorsement *sans recours*.

A drawer, or indorser, may, by express stipulation inserted in the bill or note, limit, as against all parties, his liability in any way he pleases; or he may, on the other hand, increase it by waiving, as regards himself, some or all of the holder's duties. But unless such a stipulation appear on the bill it will only be effectual between the immediate parties, or a transferee without value, and is powerless against a holder in due course. Thus, if there be a written or even verbal agreement between an indorser and his immediate indorsee, that the indorsee shall not sue the indorser, but the acceptor only, it has been held, that such an agreement is a good defence on the part of the indorser against his immediate indorsee suing in breach of the agreement (*s*). By agreement express or implied.

(*q*) Code, s. 55. Before acceptance the drawer is the principal debtor and the indorser his surety. They are both liable *pari passu* (sect. 57) to the holder, but payment by the drawer, the principal, discharges the indorser, the surety; whereas payment enforced from the indorser, the surety, does not discharge the drawer, the principal; but the indorser may recover from him afterwards. So payee or first indorser is principal as regards second indorser, and he in turn to third. After acceptance, a bill is like a note, and the liability of the drawer and of the indorsers is in abeyance, to revive on acceptor's default, on due protest, notice of dishonour, &c., unless excused. The payment by the surety must not be *voluntary* (*i.e.* without compulsion or power

to compel), or he will not fall within the definition in the Code "compelled to pay," and will be unable to recover in turn from any prior party. See *Horn v. Rouquette*, L. R., 3 Q. B. D. 519.

(*r*) The words "at the indorsee's own risk" have been held in America to exclude the personal responsibility of an indorser. See *Rice v. Stearns*, 3 Mass. Rep. 225; *Mott v. Hicks*, 1 Cowen, 512; Byles on Bills, 6th American edition, p. 242.

(*s*) Code, s. 16. *Pike v. Street*, 1 M. & M. 226; *Clark v. Pigott*, 1 Salk. 126; 12 Mod. 192; *Goupy v. Harnden*, 7 Taunt. 159; 17 R. R. 478; *Soares v. Glyn*, 8 Q. B. 24; contra, *Thompson v. Clubby*, 1 M. & W. 212; *Abrey v. Cruik*, L. R., 5 C. P. 37. See ante, pp. 102 and 115.

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Indeed, the contract between indorser and indorsee does not consist exclusively of the writing popularly called an indorsement, though that indorsement be a necessary part of it. The contract consists partly of the written indorsement, partly of the delivery of the bill to the indorsee, and may also consist partly of the mutual understanding and intention with which the delivery was made by the indorser and received by the indorsee. That intention may be collected from the words of the parties to the contract, either spoken or written, from the usage of the place, or of the trade, from the course of dealing between the parties, or from their relative situation (*t*).

But though a special contract qualifying the ordinary liability of an indorser may affect the rights of the immediate indorsee, and those who stand merely on his title, it is plain that it cannot restrain the rights of subsequent transferees for value without notice (*u*).

By converting
blank into
special in-
dorsement.

A party transferring a bill may also (as we have just seen) decline personal responsibility, by converting an existing blank indorsement into a special one in favour of his transferee.

What an in-
dorsement
admits.

An indorsement admits the signature and capacity of the drawer and every prior indorser (*x*). And in an action against an indorser the defendant will not be allowed to plead denying the indorsement to himself (*y*).

Indorsement
by a stranger.

Where a person signs a bill or note otherwise than as drawer, or acceptor, or maker, he thereby incurs the liabilities of an indorser to a holder in due course (*z*).

(*t*) *Custrique v. Buttigieg*, 10 Moo. P. C. 94; *Kidson v. Dilworth*, 5 Price, 564; 19 R. R. 656. See Byles on Bills, 6th American edition, p. 243.

(*u*) *Abrey v. Crux*, L. R., 5 C. P. 37; Code, s. 21 (2) b.

(*x*) Sect. 55 (2) b. *Lambert v. Oakes*, 1 Lord Raym. 443; 12 Mod. 244; *Lambert v. Pack*, 1 Salk. 127; *Williams v. Seagrore*, 2 Barnard. 82; *Critchlow v. Parry*, 2 Camp. 182; *Free v. Hawkins*, Holt, N. P. R. 550; *Macgregor v. Rhodes*, 25 L. J., Q. B. 318; but see *East India Company v. Tritton*, 3 B. & C. 280; 5 D. & R. 214; 27 R. R. 353.

(*y*) *Macgregor v. Rhodes*, 25 L. J., Q. B. 318; 6 E. & B. 266.

(*z*) Code, s. 56. *Matthews v. Bloram*, 33 L. J., Q. B. 209; *Ex parte Yates*, 27 L. J., Bkcy. 9. See ante, p. 174, note (*f*). It will be noticed that this section, while saddling him with the liabilities of an indorser, is silent as to the rights, and does not even style him an indorser so as to come in under s. 57, but apparently leaves him, if compelled to pay, to his rights to be indemnified at common law. The drawer cannot sue him on that alone (which would be inverting the order of parties), unless there be other written evidence of a guarantee sufficient to satisfy the Statute of Frauds. *Singer v. Elliott*, 4 T. L. R. 524. In *Steele*

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A drawer, indorser, or any party liable on a bill or note, may be discharged by the intentional cancellation of his signature by the holder or his agent; this discharges also the subsequent indorsers who would have had a right against the party so discharged (*a*).

Striking out
indorsements.

Under the old rules of pleadings all indorsements must either be proved or struck out; hence, it was usual, in an action on a bill or note where there were several indorsements, to insert two counts—one setting out the indorsements to avoid the necessity of striking them out—the other omitting them so as to prevent a non-suit in case they could not be proved; it was doubtful whether the holder could avail himself of the title of an indorser whose name he had struck out (*b*).

Where a bill or note is paid by an indorser, or where a bill payable to the drawer's order is paid by the drawer, the party paying is remitted to his former rights as regards the acceptor or maker or other antecedent parties, and he may again negotiate the bill or note after first striking out his own and subsequent indorsements (*c*).

Fourthly, as to the rights of an indorsee. A transfer by indorsement vests in the indorsee a right of action against all the parties whose names are on the bill, in case of

RIGHTS OF
INDORSEE.

v. McKinley (a case before the Code), both Lord Blackburn and Lord Watson consider that the liability is only incurred to a subsequent party, L. R., 5 Ap. Ca., at pp. 769 and 782. In *Jenkins v. Comber*, [1898] 2 Q. B. 168; 67 L. J. 780; the bill being payable to drawer's order and not indorsed, was held not to be complete and regular on the face of it as a negotiable instrument; but if the plaintiff had indorsed in blank, he might have posed as holder within s. 55 (2) a, and so raised the precise point.

(*a*) *Fairclough v. Paria*, 9 Ex. 690; Code, s. 63 (2). The striking out by mistake does not discharge. *Wilkinson v. Johnson*, 3 B. & C. 428; 27 R. R. 393; *Roper v. Birkbeck*, 15 East, 17; *Novelli v. Rossi*, 2 B. & Ad. 757; 36 R. R. 736; Code, s. 63 (3).

(*b*) *Waynam v. Bend*, 1 Camp. 175; *Bosanquet v. Anderson*, 6 Esp. 43; *Sidford v. Chambers*, 1

Stark. 326. The plaintiff had no right to strike out indorsements prior to the defendant's, as they constituted his claim to indemnity; now this would free him under sect. 63 (2). As to relying on the title of a party whose indorsement had been struck out, see *Davis v. Dodd*, 1 Wils. Ex. 110; 4 Price, 176; *Bartlett v. Benson*, 14 M. & W. 733; 15 L. J., Ex. 23. The indorsement could be struck out at the trial. *Mayer v. Judis*, 1 M. & Rob. 247.

(*c*) Code, s. 59 (2) b. This striking out indorsements previous to re-issuing the bill after maturity is now imperative, not optional. A bill to payee or order, if paid by the drawer, cannot be re-issued by him, because if the payee's indorsement be struck out, the bill is no longer negotiable, and if it be not, the payee might be made liable to a subsequent party. See *Beck v. Robley*, 4 H. Bl. (n.) 89; and Code, s. 59 (2) a.

Glenie v. Bruce Smith [1907] 2 K.B. 507.

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default of acceptance or payment; and we have already seen (*d*), that against an innocent indorsee for value, no prior party can set up the defence of fraud, duress, illegality, or absence of consideration. But, if the payee of a bill payable to order neglect to indorse, the holder has no remedy in his own name against any person but him from whom he received it, till he have obtained the indorsement, which if he gave value he may compel (*e*).

Right of
transferee to
compel in-
dorsement.

If a man have delivered a bill without indorsing it, where it was upon good consideration agreed or understood that it should be indorsed by him, and afterwards he refused to indorse, an action may be maintained against him for so refusing (*f*). He, or his personal representatives, may be ordered by the Court to indorse (*g*). But the transferee of an unindorsed bill has no right to sign his transferee's name as indorser (*h*). Nor can he obtain a good title by an indorsement written after notice to him of a fraud (*i*).

Where a bill
re-indorsed to
prior indorser.

If a bill be re-indorsed to a previous indorser, he has, in general, no remedy against the intermediate parties, for they would have their remedy over against him, and the result of the actions would be, to place the parties in precisely the same situation as before any action at all (*k*). But where a holder has previously indorsed, and the subsequent intermediate indorser has no right of action or remedy on that previous indorsement against the holder, there are cases in which the holder may sue the intermediate indorser (*l*). And if the plaintiff declared, as he

(*d*) Chapter on CONSIDERATION.

(*e*) By judgment or order, and have the indorsement made on failure of compliance by nominee of the Court, 47 & 48 Vict. c. 61, s. 14. Code, s. 31 (4). In Scotland it has been held that he can sue, and in his own name. *Hood v. Stewart*, 17 C. o. S. Ca. 749; *Good v. Walker*, 61 L. J., Q. B. 736.

(*f*) *Rose v. Sims*, 1 B. & Ad. 521.

(*g*) *Watkins v. Maule*, 2 Jac. & Walker, 242; *Smith v. Pickery*, Peake, 50; *Rolleston v. Hibbert*, 3 T. & R. 411; *Ex parte Rhodes*, 3 Mont. & Ayr. 217; *Ex parte Greening*, 13 Vcs. 206; *Edge v.*

Rumford, 31 L. J., Ch. 805; 31 Beav. 247.

(*h*) *Harrop v. Fisher*, 30 L. J., C. P. 283; and see *Moron v. Pulling*, 4 Camp. 50; Story on Bills of Exchange, s. 201; *Rose v. Sims*, 1 B. & Ad. 521.

(*i*) *Whistler v. Fowler*, 14 C. B., N. S. 248; 32 L. J., C. P. 161.

(*k*) *Bishop v. Hayward*, 4 T. R. 470; *Britten v. Webb*, 2 B. & C. 483; 3 D. & R. 650. Code, s. 59 (2) b.

(*l*) *Wilders v. Stevens*, 15 L. J., Exch. 108; 15 M. & W. 208; *Williams v. Clarke*, 16 M. & W. 834; *Smith v. Marsack*, 18 L. J., C. P. 65; 6 C. B. 486; *Morris v. Walker*, 19 L. J., Q. B. 400; 15

Walters v. Neary
21 T.L.R. 146.

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might do, on an indorsement from the first blank indorser to himself, it would, it seems, be intended that he meant to rely on his first title, and it was doubtful whether he could reply any facts arising on the intervening indorsements without a departure (*m*).

But where a bill or note is merely indorsed to another, and deposited with him as a trustee, he can only use it in conformity with the stipulations on which he became the depositary of it (*n*).

Where the indorsee is a trustee.

If the depositary of the bill indorse it over in breach of trust, the indorsee, with notice of the breach of trust, can acquire no title to the bill as against the rightful owner, and can neither sue him on the bill, nor hold the bill against him (*o*). Therefore, where the acceptor of a bill, who had received no value, delivered the bill to the drawer, desiring him to hold it for his use, but the drawer indorsed it for value to the defendant, who knew that the drawer had no authority to part with it, the defendant, the indorsee, was held liable to the acceptor in trover. "The drawer," says Lord Tenterden, "having put the bill into the defendant's hands, when the defendant knew that the drawer had no authority so to do, the defendant's title is no better than the drawer's. But then, it is said, allowing that the plaintiff had a property in the bill, the defendant had a right to hold it, because he may sue the drawer. I think the defendant had no right to hold it as against the acceptor, the plaintiff, because the defendant took the bill with the knowledge that the person from whom he took it had no title to it as against the plaintiff" (*p*).

So where the drawer of a bill of exchange deposited it with a creditor, and gave him authority to receive the proceeds and apply them in a specified way, and the drawer afterwards committed an act of bankruptcy, on which a commission issued, the creditor having, after the act of bankruptcy, delivered the original bill to the acceptor, and taken in lieu of it another bill, it was held by Tindal, C. J., that the

Q. B. 589; *Wilkinson v. Unwin*, L. R., 7 Q. B. D. 636. And to reply the facts is no departure. *Ibid.*, and Story on Promissory Notes, s. 479.

(*m*) *Bartlett v. Benson*, 15 L. J., Exch. 23; 14 M. & W. 733.

(*n*) As to the consideration where the bill is deposited as security for the balance of a

running account, see ante, CONSIDERATION.

(*o*) *Goggerly v. Cuthbert*, 2 N. R. 170. If the acceptor be compelled to pay, he may sue the depositary. *Bleaden v. Charles*, 7 Bing. 246; and see *Osborn v. Donald*, 12 W. R. 839.

(*p*) *Erans v. Kymer*, 1 B. & Ad. 528; 35 R. R. 368.

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creditor had been guilty of a conversion, and the assignees of the bankrupt might recover against him in trover (*q*). But it would have been otherwise if the creditor had merely received the money, for that would not have amounted to a conversion (*r*). Where a bill has been indorsed in blank, and the transferee of the depositary takes it without knowledge of the particular and limited purpose for which the bill was deposited with the trustee, the transferee acquires a title (*s*); and the transferee's title will not now be affected by proving him guilty of negligence, however gross, if there were no fraud. Gross negligence may, however, be evidence of fraud (*t*). And it is conceived, that if the bill had not become payable to bearer, but was transferable only by indorsement of the trustee, an indorsement by him in breach of trust to an indorsee for value, and without notice, would in general confer a title.

Restrictive
indorsements.

The trust may be expressed on the bill itself by a restrictive indorsement, or a restrictive direction appended to the payee's name, so that, into whose hands soever the bill may travel, it may carry a trust on the face of it (*u*).

An indorsement is restrictive which prohibits the further negotiation of the bill or note, as "pay D. only," or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as "pay D. for the account of X.," or "pay D. or order for collection" (*x*). A restrictive indorsement gives the indorsee the right to receive payment of the bill, and to sue any party that his indorser could have sued, but not to transfer his rights as indorsee unless expressly authorized

(*q*) *Robson v. Rolfs*, 1 M. & Rob. 239.

(*r*) *Jones v. Fort*, 9 B. & C. 764; 4 M. & Ry. 547.

(*s*) *Bolton v. Puller*, 1 B. & P. 539; 4 R. R. 723; *Ramsbottom v. Cutor*, 1 Stark. 228; *Collins v. Martin*, 1 B. & P. 648; 4 R. R. 752; *Gorgier v. Mierille*, 3 B. & C. 45; 4 D. & R. 641; 27 R. R. 290; *Wookey v. Pole*, 4 B. & Ald. 1; 22 R. R. 594; and see *Roberts v. Eden*, 1 B. & P. 398.

(*t*) *Goodman v. Harrey*, 4 Ad. & E. 870; 6 N. & M. 372; *Uther v. Rich*, 10 Ad. & E. 784; 2 Per. & D. 579.

(*u*) Code, s. 32 (6). Such restrictive indorsements are not

of very late invention, but they appear to have been well known before the middle of the last century. *Snee v. Prescott*, 1 Atk. 247; *Edie v. East India Company*, 2 Burr. 1227; 1 W. Bl. 295; and ante, p. 42.

(*x*) Code, s. 35. The Code gives no form of words for a restrictive drawing, though it clearly contemplates such by sect. 8. The following have been held to be restrictive indorsements: "The within must be credited to D.," *Ancher v. Bank of England*, 2 Doug. 637; "pay D. or order for my use," "pay D. for my account," *Edie v. East India Co.*, 2 Burr. 1227; *Erans v.*

by it. Where it does authorize further transfer, all subsequent indorsees stand in the shoes of the first restricted indorsee (*y*).

A bill was indorsed by the payee in this form :—"Pay A. B., or order, for the account of C. D.;" A. B. pledged it with the defendant, who advanced money upon it to A. B. personally. Held, that the defendant had sufficient notice, from the indorsement, that A. B. had no authority to raise money on the bill for his own benefit, and, therefore, could not defend an action of trover for the bill, brought by C. D., his principal (*z*).

A., a merchant at Boston, in New England, remitted a bill to B., his agent in London, indorsing it in this form :—"Pay B., or his order, for my use." B. discounted it with his bankers: he afterwards failed, and the bankers, to whom he was indebted in more than the amount of the bill, received payment of it at maturity from the acceptors. Held, in an action for money had and received, that the bankers were liable to refund the money to A. (*a*).

Fifthly, as to the liability of a person transferring by delivery only.

Where the holder of a bill or note made or become payable to bearer negotiates it without indorsing it, he is called a transferor by delivery, and is not liable on the instrument.

He does, however, warrant to his immediate transferee, being a holder for value, that the bill or note is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless (*b*).

LIABILITY
OF PARTY
TRANSFER-
RING BY
DELIVERY.
No liability
on the
instrument.

Cramlington, Carthew, 5 ; 2 Vent. 307 ; *Treuttel v. Barandon*, 8 Taunt. 100 ; 1 Moore, 543 ; 19 R. R. 472. The words "value in account with the Oriental Bank," have been held not to be. *Murrou v. Stuart*, 8 Moore, P. C. 267 ; *Buckley v. Jackson*, L. R., 3 Ex. 135 ; *Silkes' case*, [1891] 1 Q. B. 435.

(*y*) Code, s. 35 (2) and (3).

(*z*) *Treuttel v. Barandon*, 8 Taunt. 100 ; 19 R. R. 472 ; 1 Moore, 543.

(*a*) *Sigourney v. Lloyd*, 8 B. & C. 622 ; 32 R. R. 504 ; affirmed in the Exchequer Chamber, 5 Bing.

525 ; 3 Y. & J. 220.

(*b*) Code, s. 58 ; *Fenn v. Harrison*, 3 T. R. 757 ; *Gompertz v. Bartlett*, 23 L. J., Ex. 68 ; *Leeds Bank v. Walker*, 11 Q. B. D. 84, a case of a bank note, of which the date had been altered, and the alteration, though visible to a practised eye, was not conspicuously apparent ; sect. 64 was held not to apply as the bank clerk saw it at once. *Martin v. Morgan*, Gow, 123 ; 1 B. & B. 289 ; 3 Moore, 635 ; 21 R. R. 603 ; where the defendants, knowing a cheque to be post-dated, and therefore void under the then existing law, and

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Nor in
general on the
consideration.

Where the
bill is con-
sidered as
sold,

And it is conceived to be the general rule of the English (*c*) law, and the fair result of the English authorities, that the transferor is not even liable to refund the consideration, if the bill or note so transferred by delivery without indorsement turn out to be of no value, by reason of the failure of the other parties to it. For the taking to market of a bill or note payable to bearer without indorsing it, is *prima facie* a sale of the bill. And there is no implied guarantee of the solvency of the maker, or of any other party (*d*).

If a bill or note, made or become payable to bearer, be delivered without indorsement, not in payment of a pre-existing debt, but by way of exchange for goods, for other bills or notes, or for money transferred to the party delivering the bill at the same time, such a transaction has been repeatedly held to be a sale of the bill by the party transferring it, and a purchase of the instrument, with all risks, by the transferee. "It is extremely clear," says Lord Kenyon, "that if the holder of a bill send it to market without indorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money for which he sold it, if he did not know at the time that it was not a good bill" (*e*). So, where A. gave a bankrupt, before his bankruptcy, cash for a bill, but refused to

that the drawers were insolvent, presented it for payment and received the money from the drawees, who paid in ignorance of these facts, it was held that they were liable to the drawees in an action for money had and received. A transferor by delivery who guarantees due payment is entitled to recover from the acceptor on proof of custom, *Ex parte Bishop*, 15 Ch. D. 400, as though he had indorsed.

(*c*) In America also it has been repeatedly held, that payment in bank notes *after the bank has failed*, the fact being unknown both to payer and receiver, is good, and the loss falls on the receiver. *Bayard v. Shunk*, 1 Watts & Serg. 92; *Young v. Adams*, 6 Mass. 182-185; *Scruggs v. Gass*, 8 Yerger, 115; *Lourey v. Murrell*, 2 Porter, 282. The contrary, however, has been also held. *Lightbody v. Ontario Bank*, 11 Wend. 1; affirmed on

error in 13 Wend. 107; *Harley v. Thornton*, 2 Hill, 509; *Fogg v. Sawyer*, 9 New Hamp. 365; see Story on Promissory Notes, p. 125; and Byles on Bills, 6th American edition, 366. It is conceived that the confusion has arisen from neglecting to distinguish between the abstract questions of law and questions of fact in the particular case.

(*d*) See the observations of Littledale, J., in *Camidge v. Allenby*, 6 B. & C. 373; 30 R. R. 358, and *Rogers v. Langford*, 1 C. & M. 637, 642. See also the observations of Mr. Baron Bramwell, delivering the judgment of the Court of Exchequer, in *Guardians of the Lichfield Union v. Greene*, 26 L. J. 140; 1 H. & N. 884; *Smith v. Mercer*, L. R., 3 Ex. 51.

(*e*) *Fenn v. Harrison*, 3 T. R. 757; *Erans v. Whyle*, 5 Bing. 485; 3 M. & P. 130; *Smith v. Mercer*, L. R., 3 Ex. 51.

allow the bankrupt to indorse it, thinking it better without his name, and afterwards, on dishonour of the bill, proved the amount under the commission, the Lord Chancellor ordered the debt to be expunged, observing, that this was a sale of the bill (*f*). So, if a party discounts bills with a banker, and receives in part of the discount other bills, but not indorsed by the banker, which bills turn out to be bad, the banker is not liable. "Having taken them without indorsement," says Lord Kenyon, "he has taken the risk on himself. The bankers were the holders of the bills, and by not indorsing them, have refused to pledge their credit to their validity; and the transferee must be taken to have received them on their own credit only" (*g*). So, where, in the morning A. sold B. a quantity of corn; and, at three o'clock in the afternoon of the same day, B. delivered to A. in payment certain promissory notes of the bank of C., which had then stopped payment, but which circumstance was not at the time known to either party, Bayley, J., said, "If the notes had been given to A. at the time when the corn was sold, he could have had no remedy upon them against B. A. might have insisted on payment in money, but, if he consented to receive the notes as money, they would have been taken by him at his peril" (*h*).

Such seems the general rule governing the transfer by delivery, not only of ordinary bills of exchange and promissory notes, but also of bank notes (*i*). Nor is there any hardship in such a rule, for the remedy against the transferor may always be preserved by indorsement, or by special contract. The rule, however, is not without exceptions.

If a banker's note be given on account of a pre-existing debt, the note is not to be considered as sold (*k*). But if the banker fail and if the note be duly presented, and due

Unless the bill or note be given for a pre-existing debt.

(*f*) *Ex parte Shuttleworth*, 3 Ves. 368; 4 R. R. 20.

(*g*) *Fyde v. Clark*, 1 Esp. 447; *Bank of England v. New-man*, 1 Ld. Raym. 442; 12 Mod. 241; Com. 57; *Emly v. Lye*, 15 East, 7; 13 R. R. 347. But in *Ex parte Blackburne*, 10 Ves. 204; 7 R. R. 389, the Chancellor seemed to think, that, if goods are purchased and paid for at the time by bills not indorsed, the vendee is liable, if the bills turn out to be bad. See *Jones v. Ryde*, 5 Taunt. 487; 1 Marsh. 157; 15 R. R. 561; *Owen v. Morse*, 7 T. R. 64.

(*h*) *Camidge v. Allenby*, 6 B. & C. 373; 9 D. & R. 391; 30 R. R. 358; see *Robson v. Oliver*, 10 Q. B. 704; and see *Ward v. Evans*, 2 Ld. Raym. 928, and *Rogers v. Langford*, 1 C. & M. 637.

(*i*) Though they be country bank notes, issued by the payer himself, when the question arises in favour of sureties. *Guardians of Lichfield Union v. Greene*, 26 L. J., Exch. 140; 1 H. & N. 884.

(*k*) See as to this exception, however, the language of Lord Campbell, in *Timmins v. Gibbins*, 18 Q. B. 722.

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notice be given of the dishonour, the remedy for the antecedent debt revives. "I agree," says Holt, C. J., "the difference taken by my brother Darnell, that taking a note for goods sold is a payment, because it was a part of the original contract, but paper is no payment where there is a precedent debt. For when such a note is given in payment, it is always taken to be given under this condition, to be payment, if the money be paid thereon in convenient time" (*l*). The principle of the exception may be this. A creditor is entitled to cash. If, instead of cash, he consent to take notes, not being a legal tender, that is a favour to the debtor, and it will thence be inferred, in the absence of evidence to the contrary, that the notes were not to be payment, if, without the fault of the creditor, they turn out to be of no value.

Other
exceptions to
the general
rule.

And it is conceived, that as an express contract would make the transferor liable without indorsement, so there are other circumstances from which a jury may infer that the intention, and *implied* contract of the parties was, that the notes were not to be payment, if dishonoured (*m*).

If, for example, a man ask another to change a bank note for him as a favour, and the banker fail, it is conceived that a jury would be justified in inferring an implied contract to refund the change, if the note were duly presented and dishonoured, and due notice given (*n*); and it has been held that if a customer pay to his account with his banker notes of a bank which has failed, and the banker is guilty of no laches, the loss falls on the customer (*o*). And if a banker cash a cheque on another bank which has failed, he may recover back his money (*p*). In all cases where the

(*l*) *Ward v. Erans*, 2 Ld. Raym. 928; *Camidge v. Allenby*, 6 B. & C. 373; 30 R. R. 358. So held also by Pratt, C. J., in *Moore v. Warren*, 1 Stra. 415, and by King, C. J., in *Holme v. Barry*, 1 Stra. 415. In the case of a pre-existing debt paid by notes, if the notes be not paid and the debtor is held liable, there is no doubt as to the original debt for which he is so liable, and there is no need to invent or imply any contract to make out that debt. But where goods are exchanged against money, if the payer is held liable, it is difficult to imply a contract for goods sold

and delivered, to be paid for on request.

(*m*) See *Van Wart v. Woolley*, 3 B. & C. 446; and post, Chapter XXIII. There is no warranty that the stamp on a foreign bill has been duly cancelled. *Pooley v. Browne*, 11 C. B., N. S. 566.

(*n*) See *Rogers v. Langford*, 1 C. & M. 637; *Turner v. Stones*, 1 D. & L. 122; *Ex parte Isbester*, 1 Rose, 23; *Woodland v. Fear*, 7 E. & B. 522.

(*o*) *Timmins v. Gibbins*, 18 Q. B. 722.

(*p*) *Woodland v. Fear*, 26 L. J., Q. B. 202; 7 E. & B. 519.

receiver of the notes seeks to return them he must do so within a reasonable time (*q*).

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The sellers of bills on the London market do not, *prima facie*, trust the foreign principal of the English buyer (*r*).

To an agent
of a foreign
principal.

A transferor, by delivery, though he does not impliedly warrant the solvency of the parties to a promissory note or bill of exchange, does warrant to his immediate transferee for value that the bill or note is what it purports to be, that is to say, not forged or fictitious, that he has a good title thereto and to transfer it, and that he is not aware of any fact that renders it valueless, as for instance, that it is void, or avoided by alteration, or has been dishonoured, or that the parties to it are insolvent (*s*). And if the bill or note does not in this respect fully answer the warranty (though some signatures be genuine), yet the consideration entirely fails, and the money given for the bill may be recovered back (*t*), provided it be claimed within a reasonable time (*u*).

Warranty of
genuineness.

A transferor by delivery only warrants to his immediate transferee, and, therefore, cannot be liable in any case to a subsequent transferee, either on the instrument or the consideration. And therefore it has been held that such

No liability
to subsequent
transferee.

(*q*) See *Rogers v. Langford*, 1 C. & M. 642.

(*r*) *Poirier v. Morris*, 2 E. & B. 103.

(*s*) Code, s. 58. *Jones v. Ryde*, 5 Taunt. 487; 1 Marsh. 157; 15 R. R. 561; *Young v. Cole*, 3 Bing. N. C. 724; *Bruce v. Bruce*, 1 Marsh. 165; 5 Taunt. 495; 15 R. R. 566, n.; *Fuller v. Smith*, Ryan & M. 49; *Gurney v. Womersley*, 4 E. & B. 133. So it has been repeatedly held in America; *Ellis v. Wild*, 6 Mass. 321; *Young v. Adams*, *ibid.* 182; *Markle v. Hatfield*, 2 John. R. 455; *Eagle Bank of Newhaven v. Smith*, 5 Con. R. 71; *Strange v. Ellison*, 2 Bayley, 385; though the instrument be sold. Byles on Bills, 6th American edition, p. 255. Mr. Justice Story lays it down that there is also a warranty of the title of the transferor. Treatise on Promissory Notes, p. 123. The words used in the

Code are "that he has a right to transfer it." A right to transfer can hardly exist without a right to hold, hence indirectly he does perhaps warrant his title; but it is really immaterial whether or no that be the case, as honest acquisition of a negotiable instrument confers a new and independent title, and makes the *bond fide* possessor the true owner. See further as to transfer of a forged or altered bill, the Chapter on FORGERY and ALTERATION. He also warrants that a bill purporting to be a foreign bill, and therefore not, till negotiated here, requiring a stamp, was really made abroad. *Gompertz v. Bartlett*, 23 L. J., Q. B. 65; 2 E. & B. 854. See now 54 & 55 Vict. c. 39, s. 36.

(*t*) *In re Barrington*, 2 Sch. & Lef. 112; 9 R. R. 61.

(*u*) *Pooley v. Broune*, 31 L. J., C. P. 135; 11 C. B., N. S. 566.

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subsequent transferee cannot prove for the value in the event of the first transferor's bankruptcy (*x*).

Effect of
fraud.

But, in all cases, if notes or bills are transferred as valid, when the transferor knows they are good for nothing, the suppression of the truth is a fraud, and he is liable. "If," continues Mr. Justice Bayley, in the case before referred to, "A. could show fraud or knowledge of the maker's insolvency in the payer, then it would be wholly immaterial whether the notes were taken at the time of sale or afterwards." (*y*).

RIGHTS OF
TRANSFEREE
BY DELIVERY.

Sixthly, as to the rights of transferee by delivery.

Bills and notes payable to bearer circulate as money, and are considered as such. The *bonâ fide* possessor is, therefore, the true owner. For it is essential to the currency of money that property and possession should be inseparable (*z*). We have already seen that the indorsee of a bill payable to order, and not made payable to bearer by a blank indorsement, has no right to the bill, either so as to retain it against the real owner, or to sue any party upon it, unless the indorser had a right to indorse (*a*). Whereas, if the cheque, bill, or note, be originally made or have since duly become payable to bearer, the title of the holder, both as against a former owner on the one hand, and against the maker, acceptor, or indorser on the other, is not affected by any infirmity in the title of the transferor, provided the holder took it *bonâ fide* for value.

Former effect
of negligence
in the trans-
feree.

It was formerly considered that the transferee's title would be affected by want of due caution on his part, and that he would be liable in trover to the real owner, and unable to enforce payment against the parties to the instrument, if he were guilty of negligence in taking it. Thus, where a banker, in a small market town, changed a 500*l.* Bank of England note for a stranger, without any further inquiry than merely asking his name, he was held liable, in trover, to a party from whom the note had been unlawfully obtained; Best, C. J., observing, "The party's caution should increase with the amount of the note which he is called upon to change (*b*). A man may change a 20*l.* note

(*x*) *Gurney v. Womersley*, 4 E. & B. 133.

(*y*) *Camidge v. Allenby*, 6 B. & C. 373; 9 D. & R. 391; 30 R. R. 358; *Fenn v. Harrison*, 3 T. R. 759.

(*z*) See *Foster v. Green*, 30 L. J., Ex. 263.

(*a*) *Mead v. Young*, 4 T. R. 28; 2 R. R. 314; unless there be an estoppel. Code, s. 24.

(*b*) *Snow v. Peacock*, 2 C. & P. 221; 3 Bing. 406; and see *Gill v. Cubitt*, 3 B. & C. 466; 5 D. & R. 324; *Egun v. Threlfall*, 5 D. & R. 326.

without asking a single question, but would that be right as to one of several thousands? More caution is required in the case of a discounter than of a payer" (c).

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But it is now settled, that if a man take *honestly* an instrument made or become payable to bearer, he has a good title to it, with whatever degree of negligence he may have acted, unless his gross negligence induce the jury to find fraud. "I believe," says Lord Denman, "we are all of opinion that gross negligence only would not be a sufficient answer by the defendant where the plaintiff has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine" (d).

Present effect
of negligence
or fraud.

If the party presenting a bill or note payable to bearer be the mere agent of another, the agent's title is infected with the infirmity of his principal's title, although the principal is in the agent's debt; and the agent consequently cannot enforce payment of the maker (e).

Title of an
agent.

It makes no difference that the bill or note is only pledged, and not absolutely transferred; the pawnee acquires a property in it (f), and is not liable in trover, to the real owner, as in the case of goods improperly pledged (g).

Pledging bills
payable to
bearer.

Exchequer bills, which are payable to bearer before the blank is filled up (h), bonds of foreign princes and states

Other
instruments
payable to
bearer.

(c) *Quære*, whether there is any real difference between them.

(d) *Goodman v. Harrey*, 4 Ad. & El. 870; 6 N. & M. 372; *Uther v. Rich*, 10 Ad. & E. 784; 2 P. & D. 579. In the case of *Goodman v. Harrey*, the bill bore on it, when discounted, the notarial mark of non-acceptance. To use the words of the Lord Chief Justice, "the plaintiff received the bill with a death wound apparent on it." See also *Backhouse v. Harrison*, 5 B. & Ad. 1098; 3 N. & M. 188; *Crook v. Jadis*, 5 B. & Ad. 909; 3 N. & L. 257; *Foster v. Pearson*, 1 C., M. & R. 855; 5 Tyr. 255; *Willis v. Bank of England*, 4 A. & E. 21; *Raphael v. Bank of England*, 17 C. B. 161; *Carlton v. Ireland*, 5 E. & B. 765; *Bank of Bengal v. Fagan*, 7 Moore,

P. C. C. 72; and *supra* pp. 43 and 148.

(e) *Solomons v. Bank of England*, 13 East, 135; 1 Rose, 99; 12 R. R. 341. As to agent transgressing his authority, see *Watson v. Russell*, 34 L. J., Q. B. 93.

(f) *Barber v. Richards*, 20 L. J., Exch. 135; Code, s. 27 (3).

(g) *Collins v. Martin*, 1 Bos. & Pul. 648; 2 Esp. 520; 4 R. R. 752. See as to lien of banker, *post*.

(h) *Wookey v. Pole*, 4 B. & Ald. 1; 22 R. R. 594, see as to dividend warrants, *Partridge v. Bank of England*, 13 L. J., Q. B. 281, and 9 Q. B. 424, in error; and see further, as to Exchequer bills, *Barnett v. Brandao*, 6 M. & G. 630; *Brandao v. Barnett*, 3 C. B. 519. In the state of Georgia it has been held, that any bond payable to

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payable to bearer (*i*), and East India bonds (*k*), resemble money and bills of exchange payable to bearer, in the necessary union of possession and property. Honest acquisition confers title (*l*).

Metallic
tokens.

A metallic token, like an I O U, should seem at common law to be only evidence of a debt. Though intended for circulation it can therefore at common law give no right of action to a transferee.

But the issuer of tokens made of mixed metals, compounded partly of gold or silver, was formerly liable to the holder (*m*).

The issuer of a token, made wholly or in part of copper, is liable only to the original taker (*n*).

The issuing of tokens made partly of gold or silver was restrained by the 53 Geo. 3, c. 114 (now repealed by the 24 & 25 Vict. c. 101), and the issuing of tokens made wholly or partly of copper by the 57 Geo. 3, c. 46.

Tokens, into the composition of which neither the precious metals nor copper enter, seem left to the common law. Wages of artificers, however, cannot in certain trades, even by consent, be paid in tokens (*o*).

TRANSFER
UNDER PECU-
LIAR CIRCUM-
STANCES.

Before bill
filled up.

Seventhly, as to transfer under peculiar circumstances.

An indorsement may be made even before the bill or note itself, and so render the indorser liable to subsequent parties to any amount warranted by the stamp. The plaintiffs were bankers, with whom one G. had dealings. They refused to let him have more money, unless he procured them the indorsement of a third person. G. accordingly induced the defendant to sign his name across the back of four blank forms of promissory notes. G. then filled them up, and delivered them to the plaintiffs, who knew the notes were blank at the time of the indorsement. The notes were not paid by G., the maker, and the plaintiffs called on the defendant as indorser. Lord Mansfield: "Nothing is so clear, as that the indorsement on a blank

bearer is a negotiable instrument. Byles on Bills, 6th American edition, p. 257.

(*i*) *Gorgier v. Mierille*, 3 B. & C. 45; 4 D. & R. 641; 27 R. R. 290; *Jones v. Peppercorn*, 28 L. J., Chan. 158; 1 Johnston, 430; *Goodwin v. Roberts*, L. R., 10 Ex. 337; 44 L. J., Ex. 57 and 157. Ante, p. 80.

(*k*) 51 Geo. 3, c. 64.

(*l*) The embezzling of bills by agents, or pledging them beyond their lien, is a misdemeanor punishable by penal servitude or imprisonment, 24 & 25 Vict. c. 96, s. 75.

(*m*) 53 Geo. 3, c. 114, s. 3. As to medals resembling coins, see 46 & 47 Vict. c. 45, s. 2.

(*n*) 57 Geo. 3, c. 46.

(*o*) 1 & 2 Will. 4, c. 37.

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note is a letter of credit for an indefinite sum. The defendant said, 'Trust G. to any amount, and I will be his security.' It does not lie in his mouth to say the indorsements were not regular" (*p*).

An indorsement may be made either before or after acceptance. If a bill be indorsed after refusal to accept, and notice thereof to the indorsee, or after it is due, these are circumstances which may reasonably excite suspicions as to the liability or solvency of the antecedent parties. An indorsee, therefore, of a bill dishonoured or after due, with notice thereof, has not all the equity of an indorsee for value in the ordinary course of negotiation. He is held to take the bill on the credit of his indorser, and has no superior title against the other parties (*q*).

After refusal to accept, where the transferee has notice of the dishonour.

Drawer requested defendant to indorse two bills for his, the drawer's, accommodation. He accordingly drew two in favour of the defendant, which defendant indorsed and gave up to him. These bills the drawer then gave to A., and A. signed an agreement with defendant, that if one of the bills were paid, the defendant should be exonerated from the other. One of them the defendant accordingly did pay. The other was presented for acceptance and dishonoured; it was, after this, indorsed by A. to the plaintiffs, with notice of the dishonour. On payment being refused, plaintiff sued defendant. Held, that the plaintiffs, having taken the bill after notice of dishonour, took the title of their indorser, and that, as the agreement would have been a defence to an action at the suit of A., it was a defence also against the plaintiffs (*r*).

But if the indorsee had no notice of the dishonour, he is not prejudiced by it. Payee presented a bill for acceptance,

Where the transferee has no notice.

(*p*) Code, ss. 20 and 56; *Russell v. Langstaffe*, 2 Doug. 514; and this seems to be the law in America, though the amount of liability is not there limited by any stamp laws: Byles on Bills, 6th American edition, pp. 260 and 292; *Usher v. Dauncy*, 4 Camp. 97; 15 R. R. 729. A bill may be indorsed before the day of its date: *Pasmore v. North*, 13 East, 517; 12 R. R. 420; and see *Snaith v. Mingay*, 1 M. & Sel. 87; *Cruchley v. Clarence*, 2 M. & Sel. 90; 14 R. R. 596; and see 17 Geo. 3, c. 30, s. 1; and *Schultz v. Astley*, 2 Bing. N. C. 544; 2 Scott, 815; 1 Hodges,

525; *Carter v. White*, L. R., 20 Ch. D. 225; *Garrard v. Lewis*, L. R., 10 Q. B. D. 30; but if holder had notice of any fraud, he cannot fill in the blanks: *Hogarth v. Latham*, L. R., 3 Q. B. D. 643. See post, Chapter on ACCEPTANCE.

(*q*) Code, s. 36. But as to a bill payable to bearer, see *Goodman v. Harrey*, 4 Ad. & El. 870; 6 N. & Man. 372; *Raphael v. Bank of England*, 17 C. B. 161; *Carlton v. Ireland*, 5 E. & B. 765.

(*r*) *Crossley v. Ham*, 13 East, 498; 12 R. R. 410.

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which was refused. He neglected to advise the drawer, and thereby discharged the drawer as between the drawer and himself. He then indorsed the bill without informing his indorsee of the dishonour. Held, that the discharge to the drawer extended only to an action at the suit of the party guilty of the neglect, and that the indorsee having had no notice of the dishonour, the same defence was not available against him as against his indorser (s).

After due.

"After a bill or note is due" (t), says Lord Ellenborough, "it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he take it, though he give a full consideration for it, he takes it on the credit of the indorser, and subject to all the (u) equities with which it may be encumbered." Thus, where the defendant made a promissory note for the accommodation of the payee, and the payee indorsed it, overdue to A., and A. indorsed it to the plaintiff, it was formerly held that, as the absence of consideration would have been a good defence against the payee, it was also available both against A. and the plaintiff (x).

(s) Code, s. 36 (5). *O'Keefe v. Dunn*, 6 Taunt. 305; 1 Marsh. 613; 16 R. R. 623; affirmed in the K. B., 5 M. & S. 282; and see *Whitehead v. Walker*, 11 L. J., Exch. 168; 9 M. & W. 506; 10 M. & W. 696; and *Bartlett v. Benson*, 14 M. & W. 733; 3 D. & L. 274; 15 L. J., Exch. 23.

(t) *Tinson v. Francis*, 1 Camp. 19; 10 R. R. 617. It is apprehended that wherever it is alleged that a bill was indorsed when overdue, or under any other peculiar circumstances, it lies on the party averring the fact to prove it on the general principle, "*Ei incumbit probatio qui dicit*."

(u) In *Sturterant v. Ford*, 4 M. & G. 101, Cresswell, J., says, "Perhaps the better expression would be, that he takes the bill subject to all *its* equities." In equity it has been held that where an overdue bill of exchange was bought with stolen money, the claim of the person with whose money it had been bought was an equity attaching to the bill. In *re European Bank*, L. R., 5 Chan. Ap. 359. *Quære*, as to there not having been here some ground for constructive notice. Where

an agent without authority negotiates a bill overdue, the transferee is affected with the infirmity in the agent's title, and is liable to refund the money to the principal, and so, too, if the bill be renewed. *Lee v. Zagury*, 8 Taunt. 114; 19 R. R. 476.

(x) *Tinson v. Francis*, 1 Camp. 19; 10 R. R. 617; *Brown v. Davies*, 3 T. R. 80; 7 T. R. 429; sed vide *Charles v. Marsden*, 1 Taunt. 224; *Atwood v. Crowdie*, 1 Stark. N. P. 483; Bayley, 6th ed. 161; Chitty, 9th ed. 218; Roscoe, 386. *Quære*, whether this were at any time the law, supposing a bill to have been *accepted* after it became due. See *Stein v. Iglesias*, 1 C., M. & R. 565; 3 Dowl. 252; 1 Gale, 98. So stood the authorities till the Court of C. P., in *Sturterant v. Ford*, and the Court of Q. B., in *Lazarus v. Cowie*, 3 Q. B. 459, and perhaps the Court of Exch., in *Stein v. Iglesias*, ante, upheld the authority of *Charles v. Marsden*, and it should now seem that an original absence of consideration in the case of an accommodation bill, is not one of those

It now, therefore, seems that the original absence of consideration, in the case of *accommodation* acceptances, the object of which is to raise money, will not defeat the title of an indorsee for value of an overdue bill or note, even although the indorsee had notice of the fact when he took the bill, unless there were an agreement, express or implied, restraining the negotiation of the bill or note after it should become due (*y*).

A bill or note assigned in due time on the day of payment is to be considered as assigned before it is due (*z*).

The assignee of an overdue bill or note is not affected by an infirmity in the title of an original or antecedent party, if his immediate assignor could have maintained an action. A bill was accepted on a smuggling transaction, indorsed before it was due to a *bonâ fide* holder for value, and by the latter indorsed, after due, to the plaintiff. Held, that as the indorser might have sustained an action against the acceptor, so could his indorsee (*a*).

An indorsee of an overdue bill or note is liable to such defects of title only as attach on the bill or note itself, and not to claims arising out of collateral matters (*b*). Therefore the indorsee of an overdue note is not liable to a set-off due from the payee to the maker (*c*). And although the indorsee had notice, gave no consideration, and took the bill on purpose to defeat the set-off (*d*). Yet it should

equities which attach on the instrument and defeat the title of an indorsee for value of an overdue bill, although with notice of the fact. See *Curruthers v. West*, 11 Q. B. 143, and *Ex parte Swan*, L. R., 6 Eq. 345. The effect of the Code seems to be to uphold *Charles v. Mursden*, for though sect. 36 declares that if the party transferring when overdue, were not a holder for value, his transferee can have no better title. Sect. 28 (2) makes an accommodating party liable to a holder for value, and sect. 27 (2) constitutes the holder a holder for value, if value have at any time been given, against the acceptor and all parties prior to such time; besides absence of consideration is not one of the defects of title in sect. 29 (2) that attach to an overdue bill or note.

(*y*) *Sturterant v. Ford*, 4 M. & G. 101; *Lazarus v. Cowie*, 3 Q. B.

459; and see *Stein v. Yglesias*, 1 C., M. & R. 565.

(*z*) Byles on Bills, 6th American edition, p. 269. Code, sect. 36 (4).

(*a*) *Chalmers v. Lanion*, 1 Camp. 383; 10 R. R. 709; *Fairolough v. Paria*, 9 Exch. 690.

(*b*) *Holmes v. Kidd*, in error, 28 L. J. 113; 3 H. & N. 891.

(*c*) *Burrough v. Moss*, 10 B. & C. 558; 5 M. & R. 296; *Stein v. Yglesias*, 1 C., M. & R. 565; 3 Dowl. 252; 1 Gale, 98. It has been thought that the indorsee would be affected by the set-off, if he have notice of it at the time he takes the bill. *Goodall v. Ray*, 4 Dowl. 76. But it is now clear that notice makes no difference. *Whithead v. Walker*, 11 L. J., Exch. 168; 9 M. & W. 506; 10 M. & W. 696; and *Ex parte Swan*, L. R., 6 Eq. 345.

(*d*) *Oulds v. Harrison*, 24 L. J., Exch. 66; 10 Exch. 572.

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seem, that where a negotiable instrument is deposited as a security for the balance of accounts, and is afterwards indorsed overdue, in an action by the indorsee against the party originally liable, the state of the account may be gone into (*e*). And where there has been an agreement for a set-off, the transfer of the bill overdue will not defeat it (*f*).

Where the bill is deposited as a security for the balance of a running account, but at the time when the bill becomes due the balance is in favour of the depositor, and the bill is not withdrawn by him, and afterwards the balance shifts in favour of the depositary, the depositary is not to be considered as the transferee of an overdue bill (*g*).

Transfer of an
overdue bill
on demand or
cheque.

Bills of exchange payable on demand are deemed overdue when they appear to have been in circulation for an unreasonable length of time, and can thenceforth only be negotiated subject to any defect of title affecting them at maturity. This rule applies to bankers' cheques, transferred a long time after they are issued. The owner of a cheque on a banker for 50*l.*, having lost it, the cheque was paid five days after its date to a shopkeeper, who received the amount at the bank. Held, that the shopkeeper was liable to refund the money to the owner of the cheque; for, having taken it after due, he acquired no better title than the party from whom he took it, and that it lay on him to show that his assignor had a title. "A cheque," says Mr. Justice Holroyd, "is payable immediately; the holder of it keeps it at his peril, and a person taking it after it is due takes it also at his peril" (*h*).

But a distinction has been taken between the transfer of a bill or note payable at a fixed period and overdue, and the transfer of a cheque some days old. For, in the case of such a bill or note, there is a fixed time for payment, after which it cannot possibly circulate without some suspicion; but there is no such fixed time in the case of a cheque.

(*e*) *Collenridge v. Farquharson*, 1 Stark. 259; and see the observations of Mr. Baron Parke on this case in *Oulds v. Harrison*, *ubi supra*.

(*f*) Such an agreement being in fact a satisfaction of the bill independently of the Statute of Set-off. *Oulds v. Harrison*, *supra*.

(*g*) *Atwood v. Crowdie*, 1 Stark. 483.

(*h*) *Down v. Halling*, 4 B. &

C. 330; 6 D. & R. 445; 2 C. & P. 11; Code, s. 36 (3). Sect. 29 (2) enumerates defects of title that attach to a bill or note negotiated after due, or with notice, sub-s. (b). Unreasonable length of time is stated to be a question of fact, and therefore may vary with each particular case, where a bill is payable on demand; as to a note, see s. 86.

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And therefore, it has been held, that though the taking of a cheque six days old is a circumstance from which the *jury may infer* fraud, it is not conclusive evidence, so as to prevent the party taking the cheque from suing on it, or retaining it, or the money received upon it, and the same has been held of a cheque eight days old (*i*).

Where a note payable on demand is negotiated, it is not to be deemed overdue, so as to affect a holder without notice with defects of title, because it has been outstanding more than a reasonable time (*k*). But it must be presented within a reasonable time after indorsement, in order to charge an indorser (*l*): although it be several years old, and no interest has been paid on it. "A promissory note," says Mr. Baron Parke, "payable on demand, is intended to be a continuing security; it is quite unlike a cheque, which is intended to be presented speedily" (*m*).

Of note payable on demand.

The fact that a note is overdue must have distinctly appeared in the pleading (*n*). Pleading.

Though the maker of a bill or note assigned when overdue might resist payment at law, equity had a concurrent jurisdiction, and might, when justice required, order the instrument to be delivered up to be cancelled, and restrain the holder from proceeding at law (*o*).

Equitable relief in case of an overdue bill.

Where a banker, on whom a cheque is drawn, is also the banker of the bearer, and the cheque is paid in, there are two characters in which the banker may have received it: he may have received it merely as agent of the bearer, like any other securities which the bearer may have paid in on account; or he may have received it as drawee, and so by receiving it have paid it. *Primâ facie*, he must be taken

Transfer of a cheque drawn on the banker of the bearer.

(*i*) *Rothschild v. Corney*, 9 B. & C. 388; 4 M. & R. 411; Dans. & L. 325; 33 R. R. 209. See *Serrell v. Derbyshire Railway Company*, 9 C. B. 311; *London and County Bank v. Groom*, 8 Q. B. D. 288; 50 L. J. 517; 51 L. J. 224.

(*k*) Code, s. 86 (3). But if any evidence of payment having been refused is brought home to the holder, it may be otherwise. *Barrough v. White*, 4 B. & C. 327; 6 D. & R. 379; 2 C. & P. 8; *Goodall v. Ray*, 4 Dowl. 76.

(*l*) Sect. 86 (1).

(*m*) *Brooks v. Mitchell*, 9 M. & W. 15; *Cripps v. Davis*, 12 M. & W. 165; see *Bartrum v. Caddy*, 9 Ad. & E. 275. In America it has been held that such a note, unless transferred within a reasonable time after date, is to be considered as overdue. Byles on Bills, 6th American edition, p. 268.

(*n*) *Cripps v. Davis*, 12 M. & W. 159.

(*o*) *Hodgson v. Murray*, 2 Sim. 515; *Anon. v. Adams*, Younge, 117; 34 R. R. 260.

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to have received it as agent of the bearer (*p*), and will discharge himself by giving timely notice of non-payment to the bearer (*q*); but if, while he keeps the cheque, the drawer pays in money, the banker is bound to appropriate that money to the payment of the cheque, though a larger balance is due to him from the drawer (*r*).

After
abandonment
of right of
transferee.

Where a man, to whom a bill is transferred, sends it back as useless, that is an abandonment of his right as transferee, and he cannot, by getting the bill again into his hands, acquire a right to sue without a new transfer (*s*).

After pay-
ment by party
ultimately
liable.

After *payment* in due course by or on behalf of the acceptor or maker, bills or notes are extinguished and cannot be transferred (*t*), except promissory notes payable to bearer on demand, re-issued by the original maker, having taken out a licence for that purpose (*u*).

And an accommodation bill paid by the party accommodated (*x*) at maturity cannot be re-issued.

And a note payable on demand, which has been paid, cannot be re-issued by the maker, although the indorsee have no notice that the note has ever been paid, or that payment has ever been demanded (*y*).

By other
parties.

"A bill of exchange," says Lord Ellenborough, "is negotiable, *ad infinitum*, until it has been paid by or discharged on behalf of the acceptor" (*z*).

(*p*) *Boyd v. Emerson*, 2 Ad. & E. 184; 4 N. & M. 99.

(*q*) *Ibid.*; he being a holder for value. *Ex parte Richdale*, 19 Ch. D. 409.

(*r*) *Kilsby v. Williams*, 5 B. & Ald. 815; 1 D. & R. 476; 24 R. R. 564.

(*s*) *Cartwright v. Williams*, 2 Stark. 340. This practice is now recognized by the Code, s. 49 (6), as a notice of dishonour when the bill or note has really been dishonoured. *Quære*, whether the rights against the other parties are not abandoned if this be the method adopted. It was rarely used except by bankers, who of course did not in such case credit the customer with the amount, and are therefore unaffected.

(*t*) 55 Geo. 3, c. 184, s. 19; Code, s. 59.

(*u*) 55 Geo. 3, c. 184, ss. 14, 24; and now 54 & 55 Vict. c. 39, s. 30.

Until a bill or note has been paid by the maker or acceptor, or on their behalf, it has not discharged its functions, and does not require a new stamp, though re-issued after due, and after it has been paid by an indorser. *Callow v. Lawrence*, 3 M. & Sel. 95; 15 R. R. 423.

(*x*) *Lazarus v. Cowie*, 3 Q. B. 464; *Parr v. Jewell*, 16 C. B. 684; Code, s. 59 (3).

(*y*) *Bartrum v. Caddy*, 9 Ad. & E. 275; 1 Per. & D. 207.

(*z*) *Callow v. Lawrence*, 3 M. & S. 95; 15 R. R. 423; *Hubbard v. Jackson*, 3 C. & P. 134; 4 Bing. 390; 29 R. R. 582; *Roberts v. Eden*, 1 B. & P. 398; *Bartrum v. Caddy*, 9 A. & E. 275; *Woodward v. Pell*, 37 L. J., Q. B. 41; L. R., 4 Q. B. 55, where an indorser had paid the amount of the bill and the acceptor the costs. Code, ss. 36 (1) and 59.

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A bill of exchange, therefore, or promissory note, unless paid by the party ultimately liable, can in general be re-issued (*a*). Thus, where a bill or note is paid by an indorser, or a bill payable to drawer's order is paid by the drawer, the party paying is remitted to his former rights, as regards the acceptor, maker, or other antecedent parties, and may, after striking out his own and subsequent indorsements, re-issue the bill or note (*b*).

Re-issue.

If a bill or note be paid before it is due, and is afterwards indorsed over, it is a valid security in the hands of a *bonâ fide* indorsee. "I agree," says Lord Ellenborough, "that a bill paid at maturity cannot be re-issued, and that no action can afterwards be maintained upon it by a subsequent indorsee. A payment before it becomes due, however, I think, does not extinguish it any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills and notes; for it would be impossible to know whether there had not been an anticipated payment of them. It is the duty of bankers to make some memorandum on bills and notes which have been paid, and if they do not, the holders of such securities cannot be affected by any payment made before they are due" (*c*).

After
premature
payment.

After a partial payment, at maturity, by the acceptor, or any other party really the principal debtor, the holder cannot recover of the acceptor more than the balance (*d*).

After partial
payment.

A question sometimes arises whether a bill have been paid or transferred. Though the holder give to a person taking up the bill a general receipt, importing that he has received payment, evidence is admissible to show that such person taking up the bill paid the money, not as agent for the acceptor or drawer, but as indorsee (*e*).

Where there
is a doubt
whether the
bill were paid
or transferred.

(*a*) The Stamp Act is untouched by the Code, otherwise bank notes would be extinguished by payment, but under the Stamp Act they can be re-issued.

(*b*) Code, s. 59 (2) b. But where a bill payable to, or to the order of, a third person, is paid by the drawer, he may recover against the acceptor but cannot re-issue the bill. *Beck v. Robley*, 1 H. Bla. 89, n.; Code, s. 59 (2) a. See *ante*, p. 183 (*c*).

(*c*) *Burbidge v. Manners*, 3

Camp. 193; *Attenborough v. Muckenzie*, 25 L. J., Exch. 244.

(*d*) See the Chapter on PAYMENT.

(*e*) *Graves v. Key*, 3 B. & Ad. 313. See *Hubbard v. Jackson*, 4 Bing. 390; 1 M. & P. 11; 29 R. R. 582; and *Pollard v. Ogden*, 2 E. & B. 459; *Fitch v. Sutton*, 5 East, 230. Part payment by a stranger, if accepted in satisfaction, may be a discharge of the whole debt. *Welby v. Drake*, 1 C. & P. 557; 28 R. R. 787.

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Transfer to
acceptor or
other party
liable.

Subject to the other provisions of the Code, when a bill or note is negotiated back to the acceptor or maker, a prior indorser, or the drawer, he may re-issue and further negotiate the bill, but cannot enforce payment against any intervening party to whom he was previously liable (*f*); but transfer at or after maturity to the maker or acceptor in his own right is a discharge of the bill or note.

Transfer for
part of sum
due.

A bill or note cannot be indorsed for part of the sum remaining due to the indorser upon it, if the limitation of the sum for which it is indorsed appear on the indorsement itself. Such an indorsement is not warranted by the custom of merchants, and would be attended with this inconvenience to the prior parties, that it would subject them to a plurality of actions (*g*). It is conceived that the effect of such an indorsement, when attempted, is to give the indorsee a lien on the bill, but not to transfer a right of action, except in the indorser's name (*h*).

But if a bill or note be indorsed or delivered for a part of the sum due on it, and the limitation of the transfer do not appear on the instrument, the transferee is entitled to sue the maker or acceptor for the whole amount of the bill, and is a trustee of the surplus for the transferor (*i*).

For residue
unpaid.

If the bill have been partly paid, either by the acceptor or by the drawer, who for this purpose is the agent of the acceptor (*k*), the bill cannot be indorsed for the part remaining due (*l*), at least if the indorsement show that.

(*f*) Code, s. 37. The other provisions seem to be sects. 59 and 61. His indorsee may, however, recover against the intervening parties unless their indorsements are struck out. *Attenborough v. Mackenzie*, 25 L. J., Ex. 244. And so, too, a prior indorser, if his indorsement were not one for value, but the indorsement back to him be such, can sue his immediate indorsee, or, indeed, all subsequent indorsees, until there have been an indorsement for value. *Wilkinson v. Unwin*, 7 Q. B. D. 636. By sect. 61, if the acceptor or maker become holder in his own right or after maturity, the bill or note is discharged; implicitly, therefore, it will not be so if he be not holder in his own right, but only as assignee, or trustee, or executor, or if his right is subject to that of another, & not a right against all the world. *Nash v. De Freville* [1909] 2 Q.B. 72. C. A.

(*g*) *Hawkins v. Curdy*, 1 Lord Raym. 360; Code, s. 32 (2).

(*h*) So held in America. See Byles on Bills, 6th American edition, p. 273. Such an indorsement does not operate as a negotiation, sect. 32 (2), hence the intended indorsee is not a holder, sect. 31 (1). Still a man having a lien is a holder for value *pro tanto*, sect. 27 (3).

(*i*) *Reid v. Furnival*, 1 C. & M. 538; 5 C. & P. 499; 38 R. R. 684. The Code, s. 32 (2), expressly uses the phrase "purports." Hence a bill or note payable by instalments, cannot be indorsed for one or more only of the instalments if that appear on the indorsement.

(*k*) *Bacon v. Searles*, 1 Hen. Bl. 88.

(*l*) *Hawkins v. Curdy*, 1 Lord

When the holder of a bill or note absolutely and unconditionally, at or after its maturity, renounces his rights against the acceptor or maker, the bill or note is discharged.

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After release.

The renunciation must be in writing unless the bill or note be delivered up to the acceptor or maker.

So, too, any party to a bill or note may be released by the holder before, at, or after maturity, but such party will still remain liable to an indorsee for value before maturity, and without notice (*m*).

The holder cannot transfer after action brought, so as to enable his transferee to sue also, provided the latter were aware that the first action had been commenced (*n*). But if the transferee had no notice, the transfer is good (*o*).

After action
brought.

Where a negotiable instrument is transferred abroad, by a mode of transfer valid here, but invalid there, or *vice versa*, a question may arise as to the validity to be attributed to such a transfer in our Courts. The general rule of law on this subject is, that a contract is to be governed by the law of the country where it is made or where it is to be performed, but the remedy is to be moulded by the law of the country where it is sought (*p*). A bill is to be considered as made in the country where it is to be paid (*q*).

Transfer in
foreign
country

The subject, however, will be considered more in detail in the Chapters on FOREIGN BILLS and FOREIGN LAW.

Raym. 360 ; Carth. 466 ; *Johnson v. Kennion*, 2 Wils. 262 ; Code, s. 32 (2).

(*m*) *Dod v. Edwards*, 2 C. & P. 602. Code, s. 62. Post, Chap. XVI.

(*n*) *Marsh v. Newell*, 1 Taunt. 109 ; *Jones v. Lane*, 3 Y. & C. 281. The Queen's Bench in *Deuters v. Townsend*, 33 L. T. 301, held that this defence could not be raised by plea, and that the defendant's course was to apply to the equitable jurisdiction of the Court, although Mr. Baron Alderson, in *Jones v. Lane*, seems to have thought otherwise. In America it has been held that a judgment extinguishes the negotiable quality of a note. Byles

on Bills, 6th American edition, p. 270.

(*o*) *Colombier v. Slim*, K. B. T. T., 12 Geo. 3 ; Chit. 9th ed. 217.

(*p*) See the authorities collected in *Trimby v. Vignier*, 1 Bing. N. C. 151 ; 4 M. & S. 695 ; 6 C. & P. 23.

(*q*) Though in general the law of the country where a contract is made governs the interpretation of the contract, yet where an inland bill is indorsed abroad, the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom. Code, s. 72 (2). See, however, *Alcock v. Smith*, [1892] 1 Ch. 235 ; *Embriicos v. Anglo-Austrian Bank* [1905] 1 A.D. 677 C.A.

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After holder's
death.

After the death of the holder his personal representatives should transfer (*r*). But where indorsement is necessary, and the testator has only written his name on the bill without delivery, the executor cannot complete the indorsement by mere delivery (*s*).

After his
bankruptcy.

After the holder's bankruptcy his trustees should transfer (*t*), unless the bankrupt were merely agent or trustee. For the Bankrupt Laws have no operation on any property in the possession of the bankrupt, unless he have therein a beneficial interest.

After
marriage.

The husband of a married woman, who acquired a right to a bill or note given to the wife, either before or during marriage, should indorse (*u*).

By a deposit
with a banker.

Bankers have a general lien on all securities for money which are deposited with them, as bankers, in the way of their business, and therefore a lien even as against the true owner, on bills and notes payable to bearer, or on Exchequer bills, although the customer who deposited them was not the real owner, and had no authority to give a lien (*x*); but not on Exchequer bills which may happen to be delivered to them merely for the purpose of receiving the interest and exchanging them for new ones (*y*).

Banker's
responsibility
for safe
custody.

A doubt has been raised as to the responsibility of a banker for securities intrusted to him by a customer for safe keeping, on the ground that the banker, being a gratuitous bailee, is only liable for gross negligence (*z*).

But it is conceived that a banker in such cases can hardly be regarded as acting gratuitously for his customer, such custody being an inducement held out to attract customers, by the use of whose balances the banker is paid. This view

(*r*) See *ante*, Chapter V., EXECUTORS, and as to the question whether one of several executors can indorse.

(*s*) *Bromage v. Lloyd*, 1 Exch. 32. The bill or note belongs to the estate, and not to the intended indorsee.

(*t*) See, however, *Cohen v. Mitchell*, 25 Q. B. D. 266; and Chapter on BANKRUPTCY.

(*u*) See *ante*, Chapter V. A married woman now can hold property and deal with it as if

she were a *feme sole*; hence she alone can now indorse if it be part of her separate estate.

(*r*) *Barnett v. Brandao*, 6 M. & G. 630; *London C. Bank of Australia v. White*, L. R., 4 Ap. Ca. 413.

(*y*) *Barnett v. Brandao*, 3 C. B. 519, Dom. Proc.

(*z*) *Giblin v. McMullen*, L. R., 2 P. C. 317, where, however, it should be observed that the customer himself kept the key.

seems, moreover, to be in accordance with the most recent case on the subject (*a*).

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Where chattels are pledged as security for a debt payable *at a day prefixed*, the pledgee has at common law on default of his debtor, and after giving notice to redeem, a right to sell the pledge and reimburse himself (*b*).

Transfer
by way of
pledge.

This power of sale extends not only to a pledge of chattels, but to a pledge of stock or annuities (*c*).

The rule of the civil law is in substance the same. "Venduntur pignora simul atque solutionis dies venit, et debitor legitimo modo interpellatus, sine justâ causâ cessat" (*d*).

But a mere pledge of negotiable paper does not, it is conceived, confer a power of sale. For the pledgee is trustee of the rights and obligations of the holder. He cannot transfer his trust, but must preserve his remedies and collect payment from the parties liable at maturity. His transfer, though it may confer title, will not exonerate himself (*e*).

As to the effect of an action in trover in transferring the property in a bill, see Chapter XXVI., COLLATERAL REMEDIES.

By action in
trover.

The words goods and chattels, or either of them, in a testamentary instrument, will pass all the personal estate of the testator, including choses in action, such as bills and notes. But, where the bequest is of all goods and chattels in a particular place, bills and notes in general do not pass. But it has been considered, that such notes as are commonly treated as money will pass (*f*).

By will.

It may not be useless to subjoin a few words as to the extent to which bills or notes may be the subjects of a *donatio mortis causâ* (*g*).

*Donatio
mortis causâ.*

(*a*) *Johnstone's case*, 40 L. J., Chan. 286; *Barnett v. Brandao*, 6 M. & G. 630; 3 C. B. 519, Dom. Proc.; which last-mentioned case, it may be observed, was not brought before the notice of the Court in *Giblin v. McMullen*, *supra*.

Bankers are, of course, responsible for the care of their own clerks and servants.

(*b*) *Tucker v. Wilson*, 1 P. Wms. 261; 1 Bro. P. C. 494, in error; *Pigott v. Cubley*, 15 C. B., N. S. 701; 2 Kent's Com. 805; *Martin v. Reed*, 31 L. J., C. P. 126.

(*c*) *Tucker v. Wilson*, *ubi sup.*; *Lockwood v. Ewer*, 2 Atkyns, 303.

(*d*) *Doctrina pandectarum*, cap. 6, s. 318.

(*e*) See 2 Kent's Com. 802, 805; *Appleton v. Donaldson*, 3 Bur. 381; *Browne v. Ward*, 3 Duer. 360.

(*f*) *Stuart v. Bute*, 11 Ves. 662; and in Dom. Proc. 1 Dow. 73; 14 R. R. 14; see 1 Roper on Leg. 224, 3rd ed.; 2 Wms. on Exors. 648 and 942, 3rd ed.

(*g*) See further on this subject the profound work of the late Mr. Justice Williams on Executors.

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The law on this subject is entirely derived from the civil law. But the Digest and the commentators distinguish between several species of *donatio mortis causâ*, and in a manner very unsatisfactory (*h*). A *donatio mortis causâ* is thus defined in the Institutes: *Mortis causâ donatio est, quæ propter mortis fit suspicionem, cum quis ita donat, ut si quid humanitus ei contigisset, haberet is qui accipit; sin autem supervixisset, is qui donavit reciperet, vel si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit.* * * * * * *Et in summâ, mortis causâ donatio est, cum magis quis se velit habere, quam eum cui donat, magisque eum cui donat, quam heredem suum.* But, as now understood in the law of England, a *donatio mortis causâ* is a conditional gift by the donor in contemplation of death (*i*), to take effect in the event of death (*k*). The result of the cases seems to be, that a bond (*l*), or a policy of insurance (*m*), a deposit note, or a bank note, or bill of exchange, or promissory note, specially indorsed to the donee or made or become payable to bearer, may be the subjects of a *donatio mortis causâ* (*n*), and that the delivery of a bond with mortgage deeds will impose a trust upon the real and personal representatives in favour of the donee (*o*). But a cheque drawn by the donor upon his own banker, cannot be the subject of a *donatio mortis causâ*, because the death of the drawer is a revocation of the banker's authority to pay (*p*). No more, it is

(*h*) See the judgment of Lord Hardwicke, in *Ward v. Turner*, 2 Ves. 431; and of Lord Rosslyn, in *Tate v. Hilbert*, 2 Ves. jun. 111; 2 R. R. 175.

(*i*) *Duffield v. Elwes*, 1 Bligh, N. S. 530; 30 R. R. 69; *Miller v. Miller*, 3 P. Wms. 356. See the opinion of Eyre, C.B., in *Blount v. Barrow*, 1 Ves. jun. 546; but the qualification as to last illness is not found in the report of the case. 4 Bro. C. C. 72. See 1 Roper on Legacies, 3rd ed.; and Wms. on Exors., 3rd ed. 609.

(*k*) Delivery to an agent of the donee will be good, but not to a mere agent of the donor. *Farquharson v. Care*, 2 Coll. 356; *Powell v. Hellicar*, 28 L. J., Chan. 355; 26 Beav. 261. A mere symbolical delivery will not suffice. *Ward v. Turner*, supra. There must be an actual delivery. *Bunn v. Martham*, 7 Taunt. 227; 2 Marshall, 532; 17 R. R. 497;

Tate v. Hilbert, 2 Ves. jun. 120; 2 R. R. 175; *Irons v. Smallpiece*, 2 B. & Ald. 553; 21 R. R. 395.

(*l*) *Snellgrove v. Baily*, 3 Atk. 30. But not railway stock, *Moon v. Moon*, L. R., 18 Eq. 474.

(*m*) *Witt v. Amis*, 30 L. J., Q. B. 318.

(*n*) *Drury v. Smith*, 1 P. Wms. 405; *Miller v. Miller*, 3 P. Wms. 356; *Macdonald v. Macdonald*, 16 C. o. S. Ca. 758, S. C.; *Duffin v. Duffin*, 44 Ch. D. 76, where the donatio of a deposit note was not invalidated by there being the donor's own cheque on the form at the back.

(*o*) *Duffield v. Elwes*, 1 Bligh, N. S. 409; 30 R. R. 69.

(*p*) Unless cashed, or it seems presented for payment in the lifetime of the donor. *Bromley v. Brunton*, L. R., 6 Eq. 275; *Bouts v. Ellis*, 17 Beav. 121; 4 De G., M. & G. 249; *Powell v. Hellicar*, 28 L. J., Chan. 355; 26 Beav.

conceived, would be the gift of an I O U (*q*). And negotiable instruments, which are commonly treated as money for other purposes, may, like money, pass as *donationes mortis causâ* (*r*). The Courts lean against this sort of disposition. "Improvements in the law," says Lord Eldon, "or some things which have been considered improvements, have been lately proposed, and, if, among those things called improvements, this *donatio mortis causâ* was struck out of our law altogether, it would be quite as well" (*s*). Yet it has since been thrice held that a promissory note payable to order and not indorsed may pass as a *donatio mortis causâ*, and so too an unindorsed cheque (*t*).

A *donatio mortis causâ* may be made subject to a condition or trust (*u*).

A *donatio mortis causâ* resembles a legacy in these respects; that it is revocable during the life of the donor, that it is subject to debts on a deficiency of assets (*x*), that it is liable to duty (*y*), and that it may be made to the donor's wife.

How it
resembles a
legacy.

It differs from a legacy in these other respects; that it does not require probate, and that although it be of a specific chattel, yet the executor's assent is not necessary (*z*).

How it differs
from a legacy.

261; *Hewitt v. Kaye*, L. R., 6 Eq. 198; *Beak v. Beak*, L. R., 13 Eq. 489; 41 L. J. 470; Byles on Bills, 6th American edition, p. 45. A distinction has been held to exist between cheques payable to order and those payable to bearer: the former being held capable of being subjects of a *donatio mortis causâ*. *Rolls v. Pearce*, L. R., 5 Chan. D. 730; *In re Mead*, L. R., 15 Chan. D. 651. It must be observed, however, that the sect. 75 of the Code apparently includes both, as the words are "the duty and authority of a banker to pay a cheque are determined by notice of his customer's death." A donatio of a banker's deposit receipt was not invalidated through having a cheque form on it. *Duffin v. Duffin*, [1890] 44 Ch. D. 76.

(*q*) *Tute v. Hilbert*, 2 Ves. jun. 111; 4 Bro. C. C. 286; 2 R. R. 175. For a cheque imports immediate payment; but a cheque to buy mourning has been held to be the

subject of a *donatio mortis causâ*. *Lawson v. Lawson*, 1 P. Wms. 441; but see 2 Ves. jun. 121; see also as to cheques, *Bouts v. Ellis*, 4 De G., M. & G. 249.

(*r*) See *Ranklin v. Weguelin*, 57 Beav. 309; 29 L. J., Chan. 323; *Veal v. Veal*, 27 Beav. 303; 29 L. J., Chan. 321.

(*s*) *Duffield v. Elwes*, 1 Bligh, N. S. 633 (A.D. 1827); 7 Taunt. 221; 30 R. R. 69.

(*t*) *Veal v. Veal*, 29 L. J., Chan. 321; 27 Beav. 303; *Ranklin v. Weguelin*, *ibid.* 309; *In re Mead*, 15 Chan. Div. 651; *Clements v. Cheesman*, 27 Ch. D. 631; 54 L. J. 158.

(*u*) *Blount v. Burrow*, 4 Bro. C. C. 72; *Hills v. Hills*, 10 L. J., Exch. 440; 8 M. & W. 401; *Shenston v. Brock*, 36 Ch. D. 541.

(*x*) *Smith v. Curen*, 1 P. Wms. 406.

(*y*) 44 Vict. c. 12, s. 38; Finance Act [1894], s. 2 (c).

(*z*) *Thompson v. Hodgson*, 2 Stra. 777.

A *quid pro quo* gift differs from a gift *inter vivos* in that the former is a sale or exchange. It may be made to a man's wife, and it may be of a land or mortgage deed, though neither the land would have passed at law, nor equity have intervened. See *44 Vict. c. 12*, s. 1.

[illegible][illegible]

I am writing to you
 to tell you that I
 am very well and
 hope you are the same.
 I have been thinking
 of you very much lately
 and wondering how you
 are getting on. I hope
 you are happy and
 successful in all your
 undertakings. I am
 still in the same old
 place, but I am
 trying to make the best
 of it. I am sure you
 will understand. I am
 always your friend,
 and I hope you will
 be the same to me.
 I am, dear friend,
 ever yours,
 John Doe

the 24 & 25 Vict. c. 96, s. 27, the stealing of any bill, note, warrant, or order for the payment of money, is made felony, of the same nature, and in the same degree, and punishable in the same manner, as larceny of any chattel of like value with the money due on the security. A conviction for the theft or receiving does not divest a holder in due course of his title to a negotiable instrument that had been stolen (*f*).

The embezzlement of bills or notes by clerks or servants is felony (*g*).

Embezzlement.

The embezzlement of bills or notes by agents, not being clerks or servants, or the selling, negotiating, or pledging them, in violation of the purpose for which, by a written direction, they were intrusted, and the disposing of them for the agent's own benefit, is a misdemeanour subjecting to penal servitude (*h*).

Where a man is both entitled and liable on the face of a bill, or liable to contribute, though his liability do not appear on the face of the instrument, he cannot sue. But the technical difficulty may be removed by indorsement or transfer (*i*), before the bill is due.

Effect of a transfer in removing technical difficulties in suing.

Eighthly, as to the circumstances under which equity would restrain negotiation. A Court of Equity would interpose to restrain the negotiation of a bill unduly obtained; for the defence at law might not be available as against an innocent indorsee for value, or time may destroy the evidence (*k*); and would, on equitable terms, decree a

Jurisdiction of Court in restraining negotiations.

1133. These exceptions are palpably capricious and unreasonable, and are not to be extended. Therefore, it has been held, that a pawnbroker's ticket may be the subject of larceny. *R. v. Morrison*, 28 L. J. 210, Mag. Ca.

(*f*) Sect. 100; and *Chichester v. Hill*, 52 L. J., Q. B. 160.

(*g*) 24 & 25 Vict. c. 96, s. 68.

(*h*) 24 & 25 Vict. c. 96, s. 75. It is no defence that the instrument is incomplete. *R. v. Bowerman*, [1891] 1 Q. B. 112.

(*i*) See *Steele v. Harmer*, 15 L. J., Exch. 217; 14 M. & W. 831, and 4 Exch. 1, in error, and ante, p. 52.

(*k*) *Bromley v. Holland*, 7 Ves.

B.B.E.

20, 413; 6 R. R. 58; *Bishop of Winchester v. Fournier*, 2 Ves. jun. 483; 3 Ves. 757; 9 Ves. 355. As to the parties to the suit, see *Toley v. Carlon*, 1 Younge, 373. But the Court will not order a bill to be delivered up unless the plaintiff has a right to the possession, and the defendant's detention of the bill is inequitable. *Jones v. Lane*, 3 Y. & C. 281. In *Threlfall v. Lunt*, 7 Sim. 627, a demurrer was allowed to a bill for the delivery up of a bill of exchange, the amount of which the defendant had recovered at law, and had received from the plaintiff; but see *Pinkus v. Peters*, 6 Jurist, 431.

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bill void in its creation, or unduly obtained, to be delivered up to be cancelled (*l*), and in all the Courts this equitable jurisdiction now prevails (*m*).

(*l*) 2 Ves. jun. 488; 7 Ves. 413; 2 Ves. & Beam. 302; *Mackworth v. Marshall*, 3 Sim. 368; *Osbaldiston v. Simpson*, 13 Sim. 513. So where the name of the payee, as indorser, was forged, a *bonâ fide* holder was restrained

from suing the acceptor, and the Court directed the bill to be delivered up to be cancelled. *Esdaile v. La Nouze*, 1 Y. & C. 394; *Jones v. Lane*, 3 Y. & C. 281.

(*m*) See post, Chap. XXVI., COLLATERAL REMEDIES.

CHAPTER XIII.

OF PRESENTMENT FOR ACCEPTANCE.

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It is in all cases advisable for the holder of an unaccepted bill to present it for acceptance without delay ; for, in case of acceptance, the holder obtains the additional security of the acceptor, and, if acceptance be refused, the antecedent parties become liable immediately. It is advisable, too, on account of the drawer, for, by receiving early advice of dishonour, he may be better able to get his effects out of the drawee's hands.

Advisable in all cases.

But presentment for acceptance is not necessary in the case of a bill payable at a certain period after date. It is said, however, that it is incumbent on a holder who is a mere agent, and on the payee, when expressly directed by the drawer so to do, to present the bill for acceptance as soon as possible ; and that, for loss arising from the neglect, the payee must be responsible, and the agent must answer to his principal (*a*).

Where a bill is drawn payable at a certain period after sight, presentment for acceptance is necessary, in order to fix the maturity of the instrument (*b*).

When necessary.

Where a bill expressly stipulates that it shall be presented for acceptance, or is drawn payable elsewhere than at the residence or place of business of the drawee, it must

(*a*) Chit. 9th ed. 237 ; Poth. 128 ; Marius, 46.

(*b*) "After sight" on a bill, means after acceptance (or protest for non-acceptance), not a mere private exhibition of the bill to the drawee. *Campbell v.*

French, 6 T. R. 212 ; 3 R. R. 154. On a note it means that the note must again be exhibited to the maker, *Holmes v. Kerrison*, 2 Taunt. 323 ; 11 R. R. 594, as a condition precedent to his liability.

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be presented for acceptance before it can be presented for payment.

In no other case is presentment for acceptance necessary in order to charge any party to the bill (*c*).

When to be made.

Subject to the other provisions of the Code, when a bill payable after sight is negotiated, the holder must either present it for acceptance, or negotiate it, within a reasonable time ; if he do not do so, the drawer and all indorsers prior to that holder are discharged ; what time is reasonable depends upon the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case (*d*).

Plaintiff on Friday the 9th at Windsor, twenty miles from London, received a bill on London, at one month after sight, for 100*l*. There was no post on Saturday. It was presented on the Tuesday. The jury thought it was presented within a reasonable time, and the Court concurred (*e*).

A bill drawn by bankers in the country on their correspondents in London, payable after sight, was indorsed to the traveller of the plaintiffs. He transmitted it to the plaintiffs after the interval of a week, and they, two days afterwards, transmitted it for acceptance. Before it was presented to the drawees, the drawer had become bankrupt ; the drawees, consequently, refused to accept. Had the bill been sent by the traveller to the plaintiffs, his employers, as soon as he received it, they would have been able to get it accepted before the bankruptcy. "This is," says Lord Tenterden, "a mixed question of law and fact ; and, in expressing my own opinion, I do not wish at all to withdraw the case from the jury. Whatever strictness may be required with respect to common bills of exchange payable after sight, it does not seem unreasonable to treat bills of this nature, drawn by bankers on their correspondents, as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them, within a

(*c*) Code, s. 39 (3). When the holder of a bill drawn payable elsewhere than at the residence or place of business of the drawee, has not time with reasonable diligence to present for acceptance before the day it falls due, the delay caused by presenting for acceptance before presenting for payment is excused, and the drawers and indorsers are not discharged. Code, s. 39 (4).

(*d*) Code, s. 40. The other

provisions seems to be those relating to excuse of presentment. See s. 41 (2) ; *Muilman v. D'Equino*, 2 H. Bla. 565 ; *Fry v. Hill*, 7 Taunt. 395 ; 18 R. R. 512 ; *Shute v. Robins*, 1 M. & M. 133 ; 3 C. & P. 80 ; *Mellish v. Rawdon*, 9 Bing. 416 ; 2 M. & S. 570 ; 35 R. R. 579 ; *Ramchurn v. Radakissen*, 9 Moore, P. C. 46.

(*e*) *Fry v. Hill*, 7 Taunt. 395 ; 18 R. R. 512.

moderate time (for indefinite delay, of course, cannot be allowed), as part of the circulating medium of the country." The jury concurred with his Lordship, that the delay was not unreasonable (*f*). Where the purchaser of a bill on Rio Janeiro, at sixty days' sight, the exchange being against him, kept it nearly five months, and the drawee failed before presentment, it was held that the delay was not unreasonable. The bill," says Tindal, C.J., "must be forwarded within a reasonable time under all the circumstances of the case, and there must be no unreasonable or improper delay. Whether there has been, in any particular case, reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided by the jury, acting under the direction of the Judge, upon the particular circumstances of each case" (*g*).

But where a bill, payable after sight, was drawn in duplicate on the 12th of August, in Newfoundland, and not presented for acceptance in London till November 16, and no circumstances were proved to excuse the delay, it was held unreasonable (*h*), the Court laying some stress on the fact that the bill was drawn in sets.

Presentment must be made by or on behalf of the holder to the drawee, or his duly authorized agent (*i*), at a reasonable hour (*k*), on a business day (*l*), before the bill is overdue.

What is due
presentment.

(*f*) *Shute v. Robins*, 1 M. & M. 133; 3 C. & P. 80.

(*g*) *Mellish v. Rawdon*, 9 Bing. 416; 2 M. & Sc. 570; 35 R. R. 579.

(*h*) *Straker v. Graham*, 4 M. & W. 721.

(*i*) Where the holder's servant called at the drawee's residence and showed the bill to some person in the drawee's tanyard, who refused to accept it, but the witness did not know the drawee by sight, nor could he swear that the person to whom he offered the bill was the drawee or represented himself to be so, Lord Ellenborough held, "The evidence here offered proves no demand on the drawee, and is therefore insufficient." *Cheek v. Roper*, 5 Esp. 175.

(*k*) Code, s. 41. The usual banking hours are ten till four. Government cheques are not payable at the Bank of England after 3.0 p.m. 4 & 5 Will. 4, c. 15,

s. 21. Business hours are rather more extended than banking hours. See *Wilkins v. Judis*, 2 B. & Ad. 188; 36 R. R. 540, where Lord Tenterden held 8 p.m. not unreasonable. *Parker v. Gordon*, 7 East, 385; 8 R. R. 646; *Lestley v. Bailey*, 4 T. R. 170; 2 R. R. 350. In America it is held that business hours, except for bankers, range through the whole of the day down to the hours of rest in the evening. Byles on Bills, 6th American edition, p. 285.

(*l*) Non-business days are—Sunday, Good Friday, Christmas Day, Bank holidays, and public fast or thanksgiving days. Bank holidays in England and Ireland, under 34 Vict. c. 17, amended by 38 Vict. c. 13, s. 2, are Easter Monday, Whit Monday, First Monday in August, 26th December, if a week day, if not the 27th. In Scotland New Year's Day, Christmas Day (if either be

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Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all; presentment, then, may be made to him only.

Where the drawee is dead, presentment may be made to his personal representative; but the holder is not bound to do so, as this is one of the circumstances excusing presentment. He may treat the bill as dishonoured by non-acceptance; and so too if the drawee be bankrupt, presentment may be made either to him or his trustee, or the holder may treat it as dishonoured.

When authorized by agreement or usage, presentment through the Post-office is sufficient (*m*).

When excused.

Presentment is excused, and a bill may be treated as dishonoured by non-acceptance, when the drawee is dead or bankrupt, or is a fictitious person, or a person incapable of contracting by a bill.

Where, after the exercise of reasonable diligence, such presentment cannot be effected.

Where, although the presentment have been irregular, acceptance has been refused on some other ground.

It is no excuse for not presenting, that the holder has reason to believe that the bill will be dishonoured (*n*).

Excused by circulation.

As we have already seen, when the bill is payable after sight, the holder, instead of presenting it, may circulate it within a reasonable time. "If a bill drawn at three days' sight," says Mr. Justice Buller, "be kept out in circulation for a year, I cannot say that there would be *laches*; but if, instead of putting it into circulation, the holder were to lock it up for any length of time, I should say that he would be guilty of *laches*" (*o*). "But this cannot mean," says Tindal, C.J., "that keeping it in hand for any time, however short, would make him guilty of *laches*. It can

Sunday, then Monday), Good Friday, and the first Mondays in May and August.

(*m*) Code, s. 41 (1), c and d, and (2) a.

(*n*) Code, s. 41 (1) e. The holder must present, even although he know that the drawer has desired the drawee not to accept. *Hill v. Heap*, D. & R., N. P. C. 57; 25 R. R. 791. When the drawee has absconded, the bill may be treated at once as

dishonoured. *Anon.*, 1 Ld. Raymond, 743. But if he have merely changed his address, or if the bill be not directed to him at any particular place, the holder must use reasonable diligence to find him out. *Collins v. Butler*, 2 Stra. 1087; *Bateman v. Joseph*, 12 East, 433; 11 R. R. 443; *Smith v. Bank of New South Wales*, L. R., 4 Pr. C. 194; 41 L. J. 26.

(*o*) *Muilman v. D'Eguino*, 2 H. Bl. 565; ante, p. 212.

never be required of him instantly on receipt of it, under all disadvantages, to put it into circulation. To hold the purchaser bound by such an obligation would impede, if not altogether destroy, the market for buying and selling *foreign bills*, to the great injury, no less than to the inconvenience, of the drawer himself" (*p*). Two bills, one for 400*l.*, the other for 500*l.*, were drawn from Lisbon, on May 12, at thirty days after sight, indorsed to G. at Paris, and by G. to R. at Genoa, and by R. indorsed over. They were not presented for acceptance till 22nd August. The jury found, and the Court concurred, that the bills were, under the circumstances, presented within a reasonable time (*q*).

When the bill is presented, it is reasonable that the drawee should be allowed some time to deliberate whether he will accept or no. It seems that he may demand twenty-four hours for this purpose (and that the holder will be justified in leaving the bill with him for that period); at least, if the post do not go out in the interim (*r*), or unless, in the interim, he either accepts or declares his resolution not to accept (*s*). If more than twenty-four hours be given, the holder ought to inform the antecedent parties of it (*t*).

What time for deliberation may be given to drawee.

If the owner of a bill who leaves it for acceptance, by his negligence enable a stranger to give such a description of it as to obtain it from the drawee, without negligence on the drawee's part, the owner cannot maintain trover for it against the drawee (*u*).

Consequence of negligence in party presenting.

When a bill is duly presented for acceptance, and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he

Dishonour by non-acceptance.

(*p*) *Mellish v. Rawdon*, 9 Bing. 416; 2 M. & Sc. 570; 35 R. R. 579.

(*q*) *Goupy v. Harden*, 7 Taunt. 160; 2 Marsh. 454; 17 R. R. 478. In America it is held, that though put into circulation it must still be presented within a reasonable time. Byles on Bills, 6th American edition, p. 283.

(*r*) *Marius*, 15; Com. Dig. Merch. F. 6; *Bellasis v. Hester*, 1 Ld. Raym. 281. See the observations of Lord Cairns, *Van Dieman's Bank v. Victoria Bank*,

L. R., 3 Pr. C. 526; 40 L. J. 28. "Customary time" is the phrase used in the Code, s. 42. Proof of what is customary may differ from proof of what is reasonable; still it may be doubted whether in practice these words will affect the twenty-four hours' rule.

(*s*) Bayley, 194, 6th ed.

(*t*) *Ingram v. Foster*, 2 Smith, 242.

(*u*) *Morrison v. Buchanan*, 6 C. & P. 18.

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do not, the holder shall lose his right of recourse against the drawer and indorsers (*x*).

A bill is dishonoured by non-acceptance when it is duly presented for acceptance, and an absolute or general acceptance is refused or cannot be obtained ; or when presentment for acceptance being excused, the bill is not accepted. Subject to the other provisions of the Code, when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary (*y*).

Qualified
acceptance.

The holder has a right to expect an absolute or general acceptance, and may treat the bill as dishonoured if he do not obtain one. Still he may, if he please, take a qualified acceptance.

Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take such, or subsequently assented thereto, such drawer or indorser is discharged from liability on the bill (*z*).

When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto (*a*).

(*x*) Code, s. 42 (1). He must give due notice of dishonour (s. 48), and if the bill be a foreign bill, have it protested (s. 51.)

(*y*) Code, s. 43. The other provisions seem to be—s. 15, as to a referee in case of need, resort to whom is optional on the holder's part ; ss. 65–68, as to acceptance *supra* protest or for honour ; and ss. 48 and 51 as to notice of dishonour and protest.

(*z*) See the judgment of Bay-

ley, J., in *Sebag v. Abitbol*, 4 M. & S. 466 ; Code, s. 44. Where the holder has given due notice of an acceptance as to part, the drawer and indorsers are not discharged, sub-s. (2). A foreign bill accepted as to part must be protested for the balance.

(*a*) Ibid. sub-s. (3). As to qualified acceptances, see Code, s. 19, and *post*, Chapter on Acceptance.

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OF PROTEST AND NOTING.

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IMMEDIATELY upon the dishonour of a bill on due presentment, whether by non-acceptance or non-payment, a right of recourse against the drawer and indorsers accrues to the holder ; but in order to avail himself of this right he must (unless excused) give due notice of dishonour, and, if the bill be a foreign bill, cause it to be protested, or, at all events, noted on the day it was dishonoured.

Protest necessary on foreign bills, and why.

So, too, upon dishonour by non-payment of a note, notice of dishonour must be given to the indorsers. The duties of the holder of a dishonoured bill (or note), whether for non-acceptance or non-payment, being in fact identical, it will be convenient to consider them here. And inasmuch as the protest must be effected, or, at all events, commenced by noting on the very day of dishonour, it will be considered first.

When a foreign bill, appearing on its face to be such, is dishonoured by non-acceptance or partially accepted, or, not having been dishonoured by non-acceptance, is dishonoured by non-payment, it was and still is necessary, by the custom of merchants, in order to charge the drawer and indorsers, that the dishonour should be attested by a protest (*a*). For, by the law of most foreign nations (*b*), a protest is essential

(*a*) *Gale v. Walsh*, 5 T. R. 239 ; 2 R. R. 580 ; *Rogers v. Stephens*, 2 T. R. 713 ; 1 R. R. 605 ; *Orr v. Maginnis*, 7 East, 359 ; 3 Smith. 328 ; Code, ss. 44, 51.
(*b*) Poth. 217.

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in case of dishonour of any bill ; and, though by the law of England it is unnecessary in the case of an inland bill, yet for the sake of uniformity in international transactions, a foreign bill must be protested (*c*). Besides, a protest affords satisfactory evidence of dishonour to the drawer, who, from his residence abroad, might experience a difficulty in making proper inquiries on the subject, and be compelled to rely on the representation of the holder. It also furnishes an indorsee with the best evidence to charge an antecedent party abroad ; for foreign Courts give credit to the acts of a public functionary, in the same manner as a protest under the seal of a foreign notary is evidence, in our Courts, of the dishonour of a bill payable abroad (*d*).

But a protest is not necessary on a foreign promissory note, nor on a bill, though really a foreign bill, that does not show that on its face (*e*).

By whom to
be made.

The protest should be made by a notary public ; but, if there be no such notary in or near the place where the bill is payable, a certificate attesting the dishonour may be given by an inhabitant, in the presence of two witnesses (*f*).

Office of a
notary.

A notary, *registrarius*, *actuarius*, *scrinarius*, was anciently a scribe that only took *notes* or minutes, and made short drafts of writings and other instruments, both public and private. He is at this day a public officer of the civil and canon law, appointed by the Archbishop of Canterbury, who, in the instrument of appointment, decrees, "that full faith be given, as well in as out of judgment, to the instruments by him to be made" (*g*). This appointment is also registered and subscribed by the clerk of her Majesty for faculties in Chancery. The present act for the regulation of notaries is the 41 Geo. 3, c. 79 (*h*). By the 11th section of this statute, any person acting for reward as a notary, without being duly admitted, forfeits 50*l*. to him that will sue for the same.

(*c*) See *Borough v. Perkins*, 1 Salk. 131 ; 2 Ld. Raym. 993 ; 6 Mod. 30 ; and the argument in *Trimby v. Vignier*, 1 Bing. N. C. 151 ; 4 M. & Sc. 695 ; 6 C. & P. 25, as to a protest of a French bill payable in France.

(*d*) *Anon.*, 12 Mod. 345 ; Rep. temp. Holt. 297.

(*e*) *Bonar v. Mitchell*, 19 L. J., Exch. 302 ; 5 Exch. 415 ; that is, so far as the law of this country is concerned, but it may possibly

be necessary to do so in order to support an action in foreign countries against the maker or indorsers. Code, ss. 89 (4) and 94. A bill protested for non-acceptance may (but apparently need not necessarily be) subsequently protested for non-payment. Sect. 51 (2) and (3).

(*f*) Code, s. 94 ; and Sched. I.

(*g*) Ayliffe's Parergon, 385 ; 3 Burn's Eccl. Law, 1.

(*h*) And see 6 & 7 Vict. c. 90.

By 52 Vict. c. 10 (repealing 6 Geo. 4, c. 87, s. 20) ambassadors, etc., consuls, proconsuls, and consular agents in any foreign place are empowered to do all notarial acts.

And, by the 3 & 4 Will. 4, c. 70, attorneys residing more than ten miles from the Royal Exchange may be admitted to practise as notaries.

Subject to the other provisions of the Code, the protest of a foreign bill should be begun, at least (and such an incipient protest is called noting), on the day on which acceptance or payment is refused (*i*); but it may be drawn up and completed at any time before the commencement of the suit (*k*), or even before or during the trial (*l*), and ante-dated accordingly. An inland bill could not formerly be protested for non-payment till the day after it was due (*m*). A bill should not be protested on a bank holiday; it should be protested on the morrow (*n*).

When to be made.

A protest must be made where the dishonour occurred (*o*).

But when a bill presented through the post, is returned by post dishonoured, it may be protested at the place to which it is returned; on the day, if received during business hours, if not, on the next business day. When a bill drawn payable elsewhere than at the place of business or residence of the drawee is dishonoured by non-acceptance, it must be protested at the place where it was payable, and no further presentment to or demand on the drawee is necessary (*p*).

Where to be made.

A protest is a solemn declaration signed by the notary, containing a copy of the bill, and specifying:

Form of protest.

The person at whose request the bill is protested;

The place and date of protest;

(*i*) Code, s. 51 (4). The other provisions seem to be those contained in sub-s. (9), as to when protest is excused or waived, or delay in making it will be excused, and sect. 93 as to noting.

(*k*) Code, s. 93; *Chaters v. Bell*, 4 Esp. 48; Selw. 11th ed. 381; but see *Vandewall v. Tyrrell*, M. & M. 87, where there is payment for honour. But this case did not support the position that the notarial act cannot be formally extended afterwards. *Geralopulo v. Wieler*, 10 C. B. 690.

(*l*) Bull N. P. 272; *Orr v. Maginnis*, 7 East, 361; Thompson

on Bills, p. 145.

(*m*) 9 & 10 Will. 3, c. 17 (now repealed).

(*n*) As due presentment can only be made on a business day, and noting is to be on the same day, it follows that noting cannot be done on Bank holidays, or other non-business days. See p. 213; and 34 Vict. c. 17, Appendix.

(*o*) See *Mitchell v. Baring*, 10 B. & C. 4; M. & M. 381; 4 C. & P. 35; 34 R. R. 307.

(*p*) Code, s. 51 (6) b. The repealed Act, 2 & 3 Will. 4, c. 98, was to the same effect.

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The cause or reason for protesting ;

The demand made, and the answer given (if any), or the fact that the drawee or acceptor could not be found(*q*).

When the protest is made for a qualified acceptance, it must not state a general refusal to accept, otherwise the holder cannot avail himself of the qualified acceptance(*r*).

Stamp on protest.

Where the stamp duty on the bill or note does not exceed 1s., a protest is subject to the same duty as the bill or note, and in any other case to a duty of 1s.(*s*).

Protest for better security.

Besides the protest for non-acceptance and for non-payment, the holder may protest the bill for *better security*. Protest for better security is, where the acceptor becomes bankrupt or insolvent or suspends payment before the bill falls due. In this case, the holder may cause a notary to demand better security ; and, on its being refused, the bill may be protested, and notice of the protest may be sent to an antecedent party. Yet, it seems, the holder must wait till the bill falls due before he can sue any party. Nor does there appear any advantage from the protest more than from simple notice of the circumstances(*t*) ; except that, after such a protest, there may be a second acceptance for honour(*u*). Whereas, without the intervention of a protest, there cannot be two acceptances on the same bill(*x*).

Noting, what.

Noting is a minute made on the bill by the officer at the time of refusal of acceptance or payment. It consists of his initials, the month, the day, the year, and his charges for minuting(*y*) ; and is considered as the preparatory step to protest. "Noting," says Mr. J. Buller, "is unknown in the law, as distinguished from the protest : it is merely a preliminary step to the protest, and has grown into practice within these few years"(*z*). A bill, however, is often noted where no protest is either meant or contemplated, as in the case of many inland bills. The use of it seems to be, that a notary, being a person conversant in such transactions, is

(*q*) Code, s. 51 (7) and (8).

(*r*) *Bentinck v. Dorrien*, 6 East, 199 ; 2 Smith, R. 337 ; *Sproat v. Matthews*, 1 T. R. 182.

(*s*) 54 & 55 Vict. c. 39, s. 90, and sched. And formerly to a duty of 1s. on every other sheet or piece of paper written on. 24 & 25 Vict. c. 91, s. 25.

(*t*) *Anon.*, 1 Ld. Raym. 743 ; Mar. 110 ; Code, s. 51 (5). But

the expenses are not recoverable. *Ex parte Bank of Brazil*, [1893] 2 Ch. D. 438 ; 62 L. J. 578.

(*u*) *Ex parte Wackerbath*, 5 Ves. 574 ; s. 65 (1).

(*x*) *Jackson v. Hudson*, 2 Camp. 447 ; 11 R. R. 762.

(*y*) Kyd, 87.

(*z*) *Leftley v. Mills*, 4 T. R. 170 ; 2 R. R. 350.

qualified to direct the holder to pursue the proper conduct in presenting a bill, and may, upon a trial, be a convenient witness of the presentment and dishonour. In the meantime, the minute of the notary, accompanying the returned bill, is satisfactory assurance of non-payment or non-acceptance, to the various parties by whom the amount of the bill may be successively paid. In case of an inland bill, as it could only be protested under the statute of Will. 3 (now repealed), and the fees of a notary for protesting were thereby fixed at 6*d.*, it has been said, that no more could be charged for noting (*a*), though it was usual to charge more (*b*).

The Court would not allow the expense of noting to be recovered against the acceptor (*c*), unless it were laid as special damage in the declaration. But in actions brought since the 18 & 19 Vict. c. 67 (*d*), the expenses of noting may be recovered.

If the drawer reside abroad, a copy, or some memorial of the protest, ought to accompany the notice of dishonour (*e*). But notice of the protest certainly is not necessary, if the drawer resides within this country, though, at the time of non-acceptance, he may happen to be abroad (*f*); nor if, at the time of dishonour, he have returned home to this country. "If," says Lord Ellenborough, "the party is abroad he cannot know of the fact of the bill having been protested, except by having notice of the protest itself; but, if he be at home, it is easy for him, by making inquiry, to ascertain that fact (*g*)." Notice of protest.

And it is now decided that a *copy* of the protest need not in any case be sent (*h*). Copy of protest.

Protest is dispensed with by any circumstance which would dispense with notice of dishonour, and so too delay When protest excused.

(*a*) *Lefstley v. Mills*, 4 T. R. 170; Chitty, 9th ed. 465; 2 R. R. 350.

~~(*b*) Vide Appendix~~

(*c*) *Hobbs v. Christmas*, Sittings after Mms. T. 1831; *Kendrick v. Lomas*, 2 C. & J. 405; 2 Tyrw. 438; *Rogers v. Hunt*, 10 Exch. 474; *Dando v. Boden*, [1893] 1 Q. B. 318.

(*d*) Repealed. See now Code, s. 57.

(*e*) Bayley, Poth. 148; *Robins v. Gibson*, 1 M. & S. 288; vide

infra, Chapter on Notice of Dishonour.

(*f*) *Cromwell v. Hynson*, 2 Esp. 511.

(*g*) *Robins v. Gibson*, 1 M. & S. 288; 3 Camp. 334. In *Ex parte Lowenthal*, the Lords Justices held that notice of protest need not accompany notice of dishonour: there was, however, evidence of a subsequent admission. L. R., 9 Ch. Ap. 591.

(*h*) *Goodman v. Harrey*, 4 Ad. & E. 870; 6 N. & M. 372.

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in protesting, provided the bill be protested within a reasonable time after the cause of the delay ceases to operate, or the delay be not attributable to the holder's default (i). Hence protest of a foreign bill is excused, if the drawer had no effects in the hands of the drawee, and no reasonable expectation that the bill would be honoured (k); or, if the drawer has admitted his liability, by promising to pay. "By the drawer's promise to pay," observes Lord Ellenborough, "he admits the existence of everything which is necessary to render him liable. When called upon for payment of the bill, he ought to have objected that there was no protest. Instead of that he promises to pay it. I must, therefore, presume he had due notice, and that a protest was regularly drawn up by a notary" (l).

And it is said, that where the drawer adds a request or direction, that in the event of the bill not being honoured by the drawee, it shall be returned without protest, by writing the words "*retour sans protêt*," or "*sans frais*," a protest as against the drawer, and perhaps as against the indorsers (m), is unnecessary.

Protest of inland bills and notes,

Protest of an inland bill is optional and but rarely resorted to (n).

of a lost bill.

The loss or destruction, or wrongful detention of a bill, is no excuse for the absence of protest; but where a bill is either lost or destroyed or wrongfully detained from the true holder, protest may be made on a copy or written particulars thereof (o).

(i) Sect. 51 (9). See post, Chapter on Notice of Dishonour.

(k) *Legge v. Thorpe*, 12 East, 171; 2 Camp. 310; post, p. 248.

(l) *Gibben v. Cuggon*, 2 Camp. 188; 11 R. R. 602; *Patterson v. Beecher*, 6 Moore, 319; *Greenway v. Hindley*, 4 Camp. 52.

(m) 1 Pardessus, 540; Chitty, 10th ed. 114. The drawer may, as we have seen, qualify his contract in writing on the bill by waiving as against himself any of the holder's duties, s. 16. *Quære*, whether this would bind an indorser unless he expressly waived too.

(n) Unless an acceptance for honour be desired. Code, ss. 51

(1) and (5); 65 (1). Formerly a protest was held necessary in order to recover interest. *Harris v. Benson*, 2 Stra. 910; overruled by *Windle v. Andrews*, 2 B. & Ald. 696; 2 Stark. 425. Protest of an inland bill or note is, it is conceived, unknown to the common law, though those payable after date might be protested under the 9 & 10 Will. 3, c. 17 (now repealed), or the 2 & 3 Will. 4, c. 98 (also repealed), and as notes were put on the same footing as bills by the 3 & 4 Ann. c. 9 (repealed), presumably they also fell within the above acts.

(o) Poth. 145; Code, s. 51 (8).

In an action against the drawer of a foreign bill, protest must formerly have been averred (*p*) as well as proved; and it has been held that, if protest of an inland bill be set forth in pleading, it must be proved (*q*). But this decision proceeded on the ground that an allegation of protest of an inland bill involved a consequential claim for interest and costs; whereas it has been since decided, that such a claim may be made without protest (*r*).

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Pleading.

In an action on a foreign bill, presented abroad, the dishonour of the bill will be proved by producing the protest, purporting to be attested by a notary public; or, if there is not any notary near the place, purporting to have been made by an inhabitant, in the presence of two witnesses (*s*). But a protest made in England is not evidence of the presentment here (*t*).

Evidence.

A promise to pay is good *prima facie* evidence of protest (*u*), and of notice thereof (*x*).

Effect of a
promise to
pay.

(*p*) But the absence of the allegation of protest is a defect of form only. *Solomons v. Starely*, 3 Doug. 298; *Gale v. Walsh*, 5 T. R. 239; 2 R. R. 580; *Armani v. Castrique*, 13 M. & W. 443.

(*q*) *Boulager v. Talleyrand*, 2 Esp. 550.

(*r*) *Windle v. Andrews*, 2 B. & Ald. 696; 2 Stark. 425.

(*s*) *Anon.*, 12 Mod. 345; Rep.

temp. Holt, 297.

(*t*) *Chesmer v. Noyes*, 4 Camp. 129.

(*u*) *Patterson v. Beecher*, 6 Moore, 319; *Gibbon v. Coggon*, 2 Camp. 188; 11 R. R. 692; *Campbell v. Webster*, 15 L. J., C. P. 4; 2 C. B. 258; *Greenway v. Hindley*, 4 Camp. 52.

(*x*) *Ibid*; *Ex parte Louenthal*. L. R., 9 Ch. Ap. 591.

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SUBJECT to the other provisions of the Code when a bill of exchange is dishonoured by non-acceptance, or a bill of exchange or a promissory note is dishonoured by non-payment, notice of dishonour must be given to the drawer and indorsers of the bill, or the indorsers of the note, and any drawer or indorser, to whom such notice is not given, is discharged (a).

Where a bill has been dishonoured by non-acceptance, and notice of dishonour is not given, a subsequent holder in due course is not prejudiced.

Where a bill has been dishonoured by non-acceptance, and due notice has been given, notice of a subsequent dishonour by non-payment is not required unless the bill have been accepted in the meantime. The requisites of notice and the consequences of neglect being much the same in both cases, under the general head of notice of dishonour, will be considered notice of non-acceptance and notice of non-payment.

In considering this subject, let us inquire,—first, what form of notice is required ; secondly, how notice is to be transmitted ; thirdly, at what place it is to be given ; fourthly, at what time ; fifthly, by whom it must be given ; sixthly, to whom ; seventhly, what are the consequences of neglect ; eighthly, how notice may be excused or waived ; and lastly, how it may be proved.

DIVISION
OF THE
SUBJECT.

First, as to the form of notice. Notice does not mean mere knowledge, but an actual *notification*. For a man who

WHAT FORM
OF NOTICE IS
REQUIRED.

(a) Code, ss. 48 and 89. The other provisions seem to be those in sects. 49 (15) and 50, relating to delay in or excuse of notice. *Bleasard v. Hirst*, 5 Burr. 2672 ; *Goodall v. Dooley*, 1 T. R. 712 ; 1 R. R. 372. And the parties who are entitled to notice of non-acceptance are discharged for want of it, and are not liable for subsequent non-payment ; *Roscoe v. Hardy*, 12 East, 434 ; unless the bill come into the hands of a subsequent indorsee for value, who was not aware of the dishonour, s. 48 (1) ; *O'Keefe v. Dunn*, 6 Taunt. 305 ; 1 Marsh. 613 ; 16 R. R. 623 ; *Dunn v. O'Keefe*, 5 M. & S. 282 ; 17 R. R. 326 ; *Whitehead v. Walker*, 9 M. & W. 506. See *Goodman v. Harvey*, 4 Ad. & El. 870 ; 6 N. & B.B.E.

M. 372. Where a bill was re-indorsed to a prior indorser, and in the interval had been dishonoured by a refusal to accept, of which refusal the drawer had had no notice, it was held that the plaintiff declaring as immediate indorsee of the drawer, the defendant might plead those facts without averring that the plaintiff gave no value, or was not again indorsee before the bill became due, or had knowledge of the facts ; *Bartlett v. Benson*, 15 L. J., Exch. 23 ; 14 M. & W. 733 ; 3 D. & L. 274 ; and if notice of non-acceptance be given, the right to recover of the prior parties the full amount of the bill immediately, however distant its maturity, is complete. *Whitehead v. Walker*, 9 M. & W. 506.

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can be clearly shown to have known beforehand that the bill would be dishonoured is nevertheless entitled to notice (b).

No particular form of notice is required. It may be either written or oral, or partly written and partly oral, and need not be signed; a simple return of the bill or note itself is sufficient (c). All that is now necessary seems to be to apprise the party liable of the dishonour of the bill or note by non-acceptance or non-payment in terms that sufficiently identify the instrument (d); the announcement of the dishonour (at least if it come from the holder) amounting to a sufficient intimation to the indorser, that he is held liable (e). But where a mere demand of payment was made, the Court observed, "There is no precise

(b) See *Burgh v. Legge*, 5 M. & W. 418; *Caunt v. Thompson*, 18 L. J., C. P. 127; 7 C. B. 400.

(c) Code, s. 49 (5) and (7). The mere return of the bill without more was a practice rarely resorted to except by bankers; it is now expressly recognised. Sub-sect. (6); *Maxwell v. Brain*, 10 L. T., N. S. 381. The construction of a parol notice is for the jury, of a written notice for the Court, and therefore, perhaps, a parol notice may be good where the same words, if in writing, might be held insufficient. See *Metcalfe v. Richardson*, 11 C. B. 1011; and *Phillips v. Gould*, 8 C. & P. 355.

(d) Sub-sect. (5). Formerly it seems to have been considered that an intimation that the party would be looked to for payment was necessary in the notice if given by an indorser. *East v. Smith*, 16 L. J., Q. B. 292; 4 D. & L. 744. But the Code seems to make no distinction between notice from the holder, and that from an indorser. Neither does it apparently make an averment of due presentment necessary in a notice, or, where presentment is excused, an averment that the bill is overdue and unpaid. But unless the word "dishonoured" be used, which probably would imply such, sect. 47, it would be safer to add such an averment.

(e) It was held in *Furze v. Sharwood*, 2 G. & D. 146; 2 Q. B.

388, that a notice of the dishonour of a bill of exchange sent by the holder, need not contain an announcement that the holder looks to the party to whom it is addressed for payment, but that if the notice do not come immediately from the holder, such an intimation may perhaps be necessary. See also *East v. Smith*, 16 L. J., Q. B. 292; 4 Dowd. & L. 744. The formal protest itself, for which the notice is substituted, contains no such announcement. And see *Mires v. Brown*, 11 M. & W. 372, where Mr. Baron Alderson says, "knowledge of dishonour, obtained by communication from the holder of the bill amounts to notice;" and the observation of Cresswell, J., in *Caunt v. Thompson*, 18 L. J., C. P. 128; 7 C. B. 400. In *King v. Bickley*, 2 Q. B. 419, it was held not necessary to state in a notice of dishonour, that the holder looks to the other party for payment, and that the mere sending of notice of dishonour is itself a sufficient intimation for that purpose. The following was the form of notice:—"Sir, I hereby give you notice that a bill for 50*l.*, at three months after date, drawn by J. L. upon and accepted by J. E., of Blenheim Street, Chelsea, and indorsed by you, lies at No. 6 Ely Place, dishonoured. Yours, &c. (Signed) WM. KING." See *Chard v. Fox*, 14 Q. B. 200.

form of words necessary to be used in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Here the letter in question did not convey to the defendant any such notice: it does not even say the bill was ever accepted. We, therefore, think the notice was insufficient" (*f*). Where the attorney for the indorsee wrote a letter to the indorser to the following effect: "A bill for 683*l.*, drawn by K. on J. & Co., and bearing your indorsement, has been put into our hands by A., with directions to take legal measures for the recovery thereof, unless immediately paid to us;" it was held, that this letter was not a sufficient notice of dishonour. "The notice of dishonour," says Tindal, C.J., delivering the judgment of the Court of Exchequer Chamber, "which is commonly substituted in this country in the place of a formal protest (such formal protest being essential in other countries to enable the plaintiff to recover) most certainly does not require all the precision and formality which accompanied the regular protest, for which it has been substituted. But it should at least inform the party to whom it is addressed, either in express terms or by *necessary implication* (*g*), that the bill has been dishonoured, and that the holder looks to him for payment of the amount. Looking at this notice, we think no such intimation is conveyed in terms, or is necessarily to be inferred from its contents." The Court further observed, that it was consistent with the notice that the bill had never been presented, but that the plaintiff intended to rely on an excuse for non-presentment, that the notice did not state that the bill was due, and might not have been intended as a notice of dishonour, but might have pre-supposed it (*h*).

(*f*) *Hartley v. Case*, 4 B. & C. 339; 6 Dowl. & R. 505.

(*g*) Perhaps "reasonable intendment" would be a more correct expression than "necessary implication:" at all events the expression "necessary implication" is not to be so construed as to exclude the possibility of any other inference. See the observations of Mr. Baron Parke on this expression in *Hedger v. Stearnson*, 2 M. & W. 799; 5 Dowl. 771; *Lewis v. Gompertz*, 6 M. & W. 402.

(*h*) *Solarte v. Palmer*, 7 Bing.

530; 5 Moo. & P. 475; 1 C. & J. 417; 1 Tyr. 371; affirmed in the House of Lords, 1834, 1 Bing. N. C. 194, where Parke, J., declared the unanimous opinion of the Judges present, that the letter of the plaintiff's attorney did not amount to notice of the dishonour of the bill, as such a notice ought, in express terms or by necessary implication, to convey full information that the bill had been dishonoured.

The notice was held *insufficient* in *Boulton v. Welsh*, 3 Bing. N. C. 688; 4 Scott, 425; *Phillips*

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The following form was drawn out by the author as applicable to the case of holder giving notice to an indorser :—

1, FLEET STREET, LONDON.

26 Sept., 1842.

Sir,

I hereby give you notice that the bill of exchange dated 22nd ult., drawn by A. B. of ——— on C. D. of ———, for 100l., payable one month after date to A. B. or his order, and indorsed by you, has been duly presented for payment, but was dishonoured and is unpaid. I request you to pay me the amount thereof.

Such a notice may easily be altered and adapted to circumstances (*i*) ; in case of a foreign bill it is proper to add the words “and has been duly protested” after the word dishonoured.

Description
of the instru-
ment.

The notice must not so misdescribe the instrument that the defendant may be led to confound it with some other. Thus, a notice in the following terms : “I give you notice, that a bill for, &c., at &c., *drawn by you* upon, &c., lies at &c., dishonoured,” has been held insufficient to sustain an action against the *indorser*, who is not also the drawer (*k*). But this is only a *Nisi Prius* decision and doubtful. It has since been held that if there be more than one bill to which

v. Gould, 8 C. & P. 355 ; *Strange v. Price*, 10 A. & E. 125 ; *Messenger v. Southey*, 1 M. & G. 76 ; 1 Scott, N. R. 180 ; *Furze v. Sharwood*, 2 Q. B. 388 ; 11 L. T. 19.

And sufficient in *Woodthorpe v. Lawes*, 2 M. & W. 109 ; *Grugeon v. Smith*, 6 A. & E. 499 ; *Hedger v. Steavenson*, 2 M. & W. 799 ; 5 Dowl. 771 ; *Armstrong v. Christiana*, 5 C. B. 687 ; 17 L. J. 181 ; *Edmunds v. Cates*, 2 Jur. 183 ; *Houlditch v. Cauty*, 4 Bing. N. C. 441 ; 2 Scott, N. C. 209 ; *Lewis v. Gompertz*, 6 M. & W. 400 ; *Cooke v. French*, 10 A. & E. 131 ; *Shelton v. Braithwaite*, 7 M. & W. 436 ; *Stocken v. Collin*, 9 C. & P. 653 ; 7 M. & W. 515 ; *Housego v. Cowne*, 2 M. & W. 348 ; *Baily v. Porter*, 14 M. & W. 44 ; cited in *Allen v. Edmundson*, 17 L. J.,

Ex. 293 ; 2 Ex. 719 ; *Paul v. Joel*, 3 H. & N. 455 ; 28 L. J. Ex. 143 ; 4 H. & N. 355 ; *Robson v. Curlewis*, 2 Q. B. 421 ; *Caunt v. Thompson*, 18 L. J., C. P. 125 ; 7 C. B. 400 ; *Everard v. Watson*, 1 E. & B. 801 ; in which case Lord Campbell expressed regret at the decision in *Solarte v. Palmer*.

(*i*) The construction of all written documents is for the Court, but the meaning of peculiar expressions, which in particular places or trades have a known meaning, is for the jury. *Hutchinson v. Bowker*, 5 M. & W. 542.

(*k*) *Beauchamp v. Cash*, 1 D. & R., N. P. C. 3. Though every indorser is in the nature of a new drawer, ante, p. 174. But see *Mellersh v. Rippen*, 7 Exch. 578.

the notice may apply, it lies on the defendant to prove that fact (*l*). And if a note be improperly called a bill it is no objection (*m*), nor if a bill be improperly called a note (*n*), nor if the characters of drawers and acceptors of a bill be transposed (*o*).

In short, that a misdescription which does not mislead is immaterial (*p*), is now the rule of law, as well as of convenience and justice.

It has been held that notice of dishonour need not state on whose behalf payment is applied for, nor where the bill is lying (*q*), and a misdescription of the place where the bill is lying is immaterial (*r*), unless, perhaps, a tender were made there.

Statement of the party on whose behalf notice is given.

If the notice, by mistake, misdescribe the party giving it, by representing that it is given by or on behalf of A., when in reality it is given by or on behalf of B., it is, nevertheless, good. But the party who receives the notice is to be placed in the same situation as if the notice had really been given by A., and is at liberty to object any inability in A. to give notice; as, for example, that A. had been discharged by *laches*, or had no right of action on the bill (*s*).

It is not necessary that a *copy* of the protest should accompany notice of the dishonour of a foreign bill (*t*). But a copy or some other information of the protest should be sent (*u*), if the party to whom notice is transmitted reside abroad (*x*).

Notice of protest.

Secondly, as to the mode of transmitting the notice.

MODE OF TRANSMITTING NOTICE.
By post.

Putting a letter into the post is the most common and the safest mode of giving notice. It is not necessary to

(*l*) *Shelton v. Braithwaite*, 7 M. & W. 436.

(*m*) *Messenger v. Southey*, 1 Man. & Gr. 76; 1 Scott, N. R. 180.

(*n*) *Stockman v. Parr*, 11 M. & W. 809.

(*o*) *Mellersh v. Rippen*, 7 Exch. 578.

(*p*) Code, s. 49 (7); *Bromage v. Vaughan*, 9 Q. B. 608; *Mellersh v. Rippen*, supra; *Dennistoun v. Stewart*, 17 Howard, American Rep. 606; *Harphan v. Child*, 1 F. & F. 652.

(*q*) *Woodthorpe v. Lawes*, 2 M. & W. 109; *Housego v. Cowne*, 2 M. & W. 348; *Harrison v.*

Ruscoe, 15 L. J., Exch. 110; 15 M. & W. 231; *Maxwell v. Brain*, 10 L. T., N. S. 381.

(*r*) *Rowlands v. Sprinnett*, 14 L. J., Exch. 227; 14 M. & W. 7.

(*s*) *Harrison v. Ruscoe*, 15 L. J. Exch. 110; 15 M. & W. 231.

(*t*) *Goodman v. Harrey*, 4 Ad. & El. 870; 6 N. & M. 372.

(*u*) *Rogers v. Stephens*, 2 T. R. 713; 1 R. R. 605; *Gale v. Walsh*, 5 T. R. 239; 2 R. R. 580; *Brough v. Parkins*, 2 Ld. Raym. 993; *Cromwell v. Hynson*, 2 Esp. 511; *Robins v. Gibson*, 3 Camp. 334; 1 M. & Sel. 288; B. N. P. 271.

(*x*) See the Chapter on PROTEST, p. 221.

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prove that the letter was received, and any miscarriage will not prejudice the party giving notice(*y*). It has been ruled that, in London, delivery of a letter to a bellman in the street was not sufficient, and that it should be posted either at the General Post Office, or at an authorized receiving-house (*z*).

Direction of
the letter.

It is not sufficient that the letter be directed, generally, to a person at a large town ; as, for example, to "Mr. Haynes, Bristol" (*a*), without specifying in what part of it he resides, unless where the person to whom the letter is sent is the drawer of the bill, and has dated it in an equally general manner (*b*). But, if he has done so, then the sending of a letter, with an address as general as the drawer's description, as "T. M. Barron, Esq., London," will at least be evidence from which the jury may infer due notice (*c*). If the notice of the drawer arrive too late, through misdirection, it is for the jury to say, whether the holder used due diligence to discover the drawer's address (*d*). If the notice miscarry from the indistinctness of the drawer's handwriting on the bill, he will not be discharged (*e*).

Evidence of
notice by
post.

Where a witness said that the letter, containing notice of dishonour, was put on a table to be carried to the post-office, and that by the course of business all letters deposited on this table were carried to the post-office by a porter, Lord Ellenborough said, "You must go further ; some evidence must be given that the letter was taken from the table in the counting-house and put into the post-office. Had you called the porter and he had said that, although he had no recollection of the letter in question, he invariably carried to the post-office all the letters found upon

(*y*) Code, s. 49 (15) : *Saunderson v. Judge*, 2 H. Bl. 509 ; 3 R. R. 492 ; *Kufh v. Weston*, 3 Esp. 54 ; *Parker v. Gordon*, 7 East. 385 ; 3 Smith 358 ; *Langdon v. Hulls*, 5 Esp. 157 ; *Dobree v. Eastwood*, 3 C. & P. 250 ; *Stocken v. Collin*, 7 M. & W. 515 ; 9 C. & P. 653 ; *Woodcock v. Houldsworth*, 16 L. J., Exch. 49 ; 16 M. & W. 126 ; *Mackay v. Judkins*, 1 F. & F. 208.

(*z*) *Hawkins v. Rutt*, Peake's N. P. C. 186 ; but see *Puck v. Alexander*, 3 M. & Sco. 789, and *Skilbeck v. Garbett*, 14 L. J.,

Q. B. 339 ; 7 Q. B. 846. "A bellman," says Lord Denman, "is an ambulatory post office."

(*a*) *Walter v. Haynes*, R. & M. 149.

(*b*) *Mann v. Moors*, 1 R. & M. 249 ; *Clarke v. Sharpe*, 3 M. & W. 166 ; 1 Hor. & H. 35 ; *Siggers v. Browne*, 1 Moo. & Rob. 520 ; *Burmester v. Barron*, 17 Q. B. 828.

(*c*) *Burmester v. Barron*, supra.

(*d*) Ibid. ; see *Esdaile v. Sowerby*, 11 East, 114 ; 10 R. R. 440.

(*e*) *Hewitt v. Thompson*, 1 Moo. & Rob. 543.

the table, this might have done (*f*), but I cannot hold this general evidence of the course of business, in the plaintiff's counting-house, to be sufficient" (*g*). The post marks in town or country, proved to be such, are evidence that the letters, on which they are, were in the office to which those marks belong, at the time of the dates of such marks (*h*). But they are not conclusive evidence (*i*).

A duplicate original, or an examined copy, or oral evidence of a written notice of dishonour, are admissible without notice to produce the original (*k*).

Though there be a general post, the holder may send notice by a special messenger (*l*); but if the notice be not communicated by the special messenger till after the day when it would have been conveyed by the post, it is insufficient (*m*). Where the communication by the post is infrequent, as where the party to whom notice is to be sent lives out of the usual course of the post, so that a letter may, possibly, not reach him for a fortnight, he may be charged a reasonable sum by the holder for the expense of a special messenger (*n*).

Special messenger.

Personal service of a written notice is not necessary (*o*).

In the case of a foreign bill, it is sufficient to send it by the first mail or regular ship bound for the place to which it is to be sent; and it is no objection that, if sent by a chance ship, bound elsewhere, it would have arrived sooner.

How to be sent in case of foreign bill.

(*f*) So held in *Skilbeck v. Garbett*, 14 L. J., Q. B. 388; 7 Q. B. 846.

(*g*) *Hetherington v. Kemp*, 4 Camp. 194; 16 R. R. 773; *Hawkes v. Salter*, 4 Bing. 715; 1 Moo. & P. 750; 29 R. R. 708, S. P.; and see *Hagedorn v. Reid*, 3 Camp. 379; 1 M. & S. 567.

(*h*) *Kent v. Louen*, 1 Camp. 177; *Fletcher v. Braddyl*, 3 Stark. 64; 23 R. R. 758; *R. v. Plumer*, R. & R. C. C. 254; 15 R. R. 741; *R. v. Watson*, 1 Camp. 215; *Langdon v. Hulls*, 5 Esp. 156; *R. v. Johnson*, 7 East, 65; 8 R. R. 597.

(*i*) *Stocken v. Collin*, 7 M. & W. 515; 9 C. & P. 653.

(*k*) *Acland v. Pierce*, 2 Camp. 601; *Roberts v. Bradshaw*, 1 Stark. 28; *Kine v. Beaumont*, 3 B. & B. 288; 7 Moore, 112; 24 R. R. 678, 680; secus as to a notice of the dishonour of a

bill, not being the bill sued on: *Lanauze v. Palmer*, 1 Moo. & Mal. 31; 31 R. R. 709.

(*l*) *Dobree v. Eastwood*, 3 C. & P. 250.

(*m*) *Darbishire v. Parker*, 6 East, 3; 2 Smith, 195. It has been held, that it may arrive later during business hours in the same day without discharging the indorser. *Bancroft v. Hall*, Holt's N. P. C. 476. Where a letter containing notice was sent to the wrong branch of a bank, a telegram despatched the following day was held under the circumstances to be sufficient, *dissentiente* Collins, L.J., *Fielding v. Corry*, [1898] 1 Q. B. 268; 67 L. J. 7.

(*n*) *Pearson v. Crallan*, 6 Smith, 404.

(*o*) *Housego v. Cowne*, 2 M. & W. 348.

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"It is sufficient for a party in India," says Eyre, C.J., "to send notice by the first regular ship going to England, and he is not bound to accept the uncertain conveyance of a foreign ship."—"It was enough to do so by the first ship, whether English or foreign, that was going to England in the regular course of conveyance" (*p*).

We have already seen (*ante*, pp. 221 and 229) in what cases a copy or notice of the protest must accompany notice of the dishonour of a foreign bill.

AT WHAT
PLACE.

Thirdly, as to the place at which notice is to be given.

A notice of dishonour should regularly be sent to the place of business, or to the residence of the party for whom it is designed (*q*).

If a party, whose name is on a bill, direct a notice to be sent to him when absent at a distance from his residence, so that its transmission thither, and thence to the prior parties, will occupy more time than if the notice had passed through the ordinary place of residence, a notice to him at the substituted and more distant place will, it seems, not only be a good notice as against him, but also a good notice as against prior parties (*r*).

A message sent to a counting-house within the usual hours of business has been held sufficient, though no person be in attendance. Thus, where the holder sent to a counting-house, and the messenger knocked at the outer door on two successive days, making noise sufficient to be heard by persons within, Lord Ellenborough said (*s*): "The counting-house is a place where all appointments respecting the business, and all notices, should be addressed; and it is the duty of the merchant to take care that a proper person be in attendance. It has, however, been argued, that notice in writing left at the counting-house, or put into the post, was necessary, but the law does not require it, and with whom was it to be left? Putting a letter into the post is only one mode of giving notice; but, where both parties are residing in the same town, sending a clerk is a more regular and less exceptionable mode" (*t*). But

(*p*) *Muilman v. D'Eguino*, 2 H. Bl. 565.

(*q*) It has been held in America that notice put into the post-office, if the parties live in different places, is good. It is otherwise when the parties reside in the same town. See 6th American ed. of Byles on Bills, p. 424.

(*r*) *Shelton v. Braithwaite*, 8 M. & W. 252; *Crosse v. Smith*, *infra*.

(*s*) *Crosse v. Smith* was decided before *Solarte v. Palmer*, and when the form of pleading made it unnecessary to distinguish between actual notice and a dispensation with notice.

(*t*) *Crosse v. Smith*, 1 M. & S.

the mere act of going and knocking at the door will not sustain an allegation of actual notice, though it may enlarge the time necessary for giving it, or under some circumstances be evidence of a dispensation (*u*). A message left at the dwelling-house of a private person with his wife has been held sufficient (*x*).

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Fourthly, as to the time *when* notice of dishonour should be given.

WHEN TO BE
GIVEN.

The general rule is, that notice must be given before action brought either immediately, or within a reasonable time after the dishonour; and that what is a reasonable time is a question of law, depending on the facts of each particular case (*y*). Accordingly, the due interval within which notice may or must be given, in a variety of conjunctures, has been defined by the decisions.

In the absence of special circumstances, notice is not deemed to have been given within a reasonable time, unless it be sent off on the day (being a business day, Code, s. 92) following the dishonour, if there be a post at a convenient hour on that day, or if there be none, by the next post thereafter, in cases where the person giving and the person receiving notice reside in different places. "It is," says Abbott, C.J., "of the greatest importance to commerce that some plain and precise rule should be laid down, to guide persons in all cases, as to the time within which notice of the dishonour of bills must be given. That time I have always understood to be, the departure of the post on the day following that in which the party receives intelligence of the dishonour. If, instead of that rule, we are to say that the party must give notice by the next practicable post, we should raise, in many cases, difficult questions of fact, and should, according to the different local situations of parties, give them more or less facility in complying with the rule. But no dispute can arise from adopting the rule which I have stated" (*z*).

Where the
parties live in
different
places.

545; 14 R. R. 529; *Goldsmith v. Bland*, Chit. 10th ed. 319; Bayley, 6th ed. 276; *Bancroft v. Hall*, Holt's N. P. C. 476.

(*u*) *Allen v. Edmundson*, 2 Exch. 719.

(*x*) *Housego v. Cowne*, 2 M. & W. 348.

(*y*) Code, s. 49 (12); *Darbishire v. Parker*, 6 East, 3; 2 Smith, 195; *Gladwell v. Turner*, L. R., 5 Ex. 59; 39 L. J. 31. As to

when a bill is dishonoured by non-acceptance, see Code, s. 43 (1), and a bill or note by non-payment, sect. 47 (1).

(*z*) Code, s. 49 (12) b; *Williams v. Smith*, 2 B. & Ald. 496; 21 R. R. 373. In *Gladwell v. Turner*, supra, Martin, B., was of opinion that next day meant next day after holder, having exercised reasonable diligence, was in a position to give notice.

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If the post does not go out on the next day, notice need not be posted till the day after, or till the next post-day. Thus, where the plaintiff received intelligence of the dishonour on Thursday morning, at nine o'clock, though the post did not go out till nine o'clock at night, and no bag was made up on the Friday, but the plaintiff wrote on Saturday, Lord Tenterden said, "It suffices, in this case, that the plaintiff put the letter into the post on Saturday; for, if he had done so on the Friday, it would not have been forwarded till the Saturday night, and it is immaterial whether the letter lay in the post-office or in the plaintiff's hands till the Saturday" (*a*). So, if the post goes out at an unseasonable hour in the morning, the holder is not bound to get up and write by the second post, but may wait for the third. Thus, where a bill was dishonoured on Saturday in a place where the post went out at half-past nine in the morning, it was held that it was sufficient notice of dishonour to send a letter by the following Tuesday morning's post (*b*).

In the same
place.

So, too, in the absence of special circumstances, where both the parties live in the same town, or where they live in London (*c*), notice must be given in time to be received in the course of the business day next after the day of dishonour (*d*). And, therefore, though a letter be put into the post in London on the day after the dishonour, it will not be sufficient notice, unless posted in time to be delivered the same day. Lord Ellenborough: "Where the parties reside in London, each party should have a day to give notice. The holder of a bill is not, *omissis omnibus aliis negotiis*, to devote himself to giving notice of its dishonour. If you limit a man to a fractional part of a day, it will come to a question how swiftly the notice can be conveyed,—a man and horse must be employed, and you will have a race against time. But here a day has been lost. The plaintiff

(*a*) *Geill v. Jeremy*, Moo. & M. 61.

(*b*) *Hawkes v. Salter*, 4 Bing. 715; 1 Moo. & P. 750; 29 R. R. 708; *Bray v. Hadwen*, 5 M. & Sel. 68; 17 R. R. 277; *Wright v. Shawcross*, 2 B. & Ald. 501, n.

(*c*) I am not aware that the precise extent of the word London, as here used, has been defined by any decision, nor that it has been held incumbent on a person giving notice of dishonour to treat all persons living within the limits of what was formerly

the twopenny post, as living in the same place.

(*d*) Code s. 49 (12) a; *Scott v. Lifford*, 9 East, 347; 1 Camp. 246; *Smith v. Mullett*, 2 Camp. 208; 11 R. R. 694; *Marsh v. Maxwell*, 2 Camp. 210, n.; 11 R. R. 696, n.; *Jameson v. Swinton*, 2 Camp. 374; 2 Taunt. 224; *Hilton v. Fairclough*, 2 Camp. 633; 12 R. R. 766; *Haynes v. Birks*, 3 Bos. & Pull. 599; *Williams v. Smith*, 2 B. & Ald. 500; 21 R. R. 373; *Fowler v. Hendon*, 4 Tyrw. 1002.

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had notice himself on the Monday, put in the letter on Tuesday afternoon, and the defendant does not receive notice till the Wednesday. If a party has an entire day, he must send off his letter conveying the notice within post-time of that day. The plaintiff only wrote the letter to the defendant on the Tuesday. It might as well have continued in his writing-desk on the Tuesday night, as lie at the post-office (*e*). A person who puts the letter into the post on the day when it ought to be received, must show affirmatively that it was posted in time to be received on that day (*f*). The post-mark is not conclusive evidence of the time when a letter is posted" (*g*).

When a party receives due notice of dishonour, he has the like time allowed for giving notice to the antecedent parties (*h*).

When a party receiving notice, must transmit it.

It has been doubted (*i*) whether, seeing that the acceptor of an inland bill has, in the case of other debts, the whole of the day on which the bill falls due to pay it, notice of non-payment *can* be given till the day after. But it is now settled that notice may be given, at any time after demand on the day the bill becomes due. "The other party," observes Lord Ellenborough, "cannot complain of the extraordinary diligence used to give him information" (*k*).

May be given on the day of dishonour.

Notice of dishonour may be given on the same day, though there be no actual refusal, if the house where the bill is payable be shut up and no one be there (*l*).

Where a bill when dishonoured is in the hands of an agent, as a banker for instance, he may either give notice to the parties himself, or to his principal; in the latter case he is considered as a holder, and has the usual time to give notice to his principal, and the principal the like for giving notice to the antecedent parties (*m*). Upon the same principle, where the holder of a bill employed an attorney to give notice to an indorser, and the attorney wrote to another

When, if bill is deposited with banker, attorney or agent.

(*e*) *Smith v. Mullett*, 2 Camp. 208; 11 R. R. 694.

(*f*) *Fowler v. Hendon*, 4 Tyrw. 1002.

(*g*) *Stocken v. Collin*, 7 M. & W. 515; 9 C. & P. 653.

(*h*) Code, s. 49 (14); *Geill v. Jeremy*, Moo. & M. 68.

(*i*) *Leftley v. Mills*, 4 T. R. 170; 2 R. R. 350.

(*k*) Code, s. 49 (12); *Burbridge v. Manners*, 3 Camp. 193; 13 R. R.

786; *Ex parte Moline*, 19 Ves. 216; *Hume v. Peploe*, 8 East, 169; 9 R. R. 399; *Hine v. Allely*, 4 B. & Ad. 624; 1 N. & M. 433; 38 R. R. 330.

(*l*) *Hine v. Allely*, 4 B. & Ad. 624; 1 N. & M. 433; 38 R. R. 330.

(*m*) Code, s. 49 (13); *Robson v. Bennett*, 2 Taunt. 388; 11 R. R. 614; *Langdale v. Trimmer*, 15 East, 291; *Bray v. Hadwen*, 5 M. & Sel. 68; 17 R. R. 277.

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professional man, requesting him to ascertain the indorser's residence, and received an answer to his letter, conveying the desired information, on the 16th of the month, which information he communicated to his principal on the 17th, and on the 18th forwarded the letter containing the notice of dishonour, it was held sufficient. "If," says Lord Tenterden, "the notice had been sent to the principal, he would have been bound to give notice on the next day, but it having been sent to the agent, he was not bound to give notice on the following day. A banker who holds a bill for a customer is not bound to give notice of dishonour on the day on which the bill is dishonoured. He has another day, and, upon the same principle, I think the attorney in this case was entitled, by law, to be allowed a day to consult his client" (*n*).

Notice
through
branch banks.

Where a bill passes through several branch banks of the same establishment, each branch may be considered as a distinct holder entitled to receive and transmit notice as such (*o*).

Sundays, holi-
days, and
bank holidays,
how reckoned.

Sunday, Christmas Day, Good Friday, bank holidays, a public thanksgiving or fast day, or any festival on which a man is forbidden by his religion to transact any secular affairs (for the law merchant respects the religion of different people), are not to be reckoned, in computing the time within which notice of dishonour should be given (*p*). If a man receive a letter containing notice of dishonour on such a day, he is not bound to open it, and will be considered as having received notice on the next day.

Burden of
proof.

It lies on the plaintiff to show that notice was given in due time and before action brought. In an action by the indorsee against an indorser of a bill of exchange, a witness

(*n*) *Firth v. Thrush*, 8 B. & C. 387; 2 Man. & Ry. 359; Dans. & L. 151; 32 R. R. 421. See, however, *In re Leeds Banking Company*, 1 Law Rep., Eq. 1; 35 L. J., Ch. 33. But in this case the prior decisions were not brought under the notice of the Vice-Chancellor.

(*o*) *Corlett v. Jones*, Exch. 1842; *Clode v. Bayley*, 12 M. & W. 51. And so held, although the bill may have passed by delivery without indorse-

ment. Ibid. See further as to branch banks, *Woodland v. Fear*, 7 E. & B. 519; *Prince v. Oriental Bank*, [1878] 3 Ap. Ca. 335.

(*p*) Code, s. 92; 39 & 40 Geo. 3. c. 42; 7 & 8 Geo. 4, c. 15; *Lindo v. Unsworth*, 2 Camp. 602; 12 R. R. 750; *Tassell v. Lewis*, 1 Ld. Raym. 743. See p. 213, and 34 Vict. c. 17, s. 2, APPENDIX. A religious difficulty would probably be a "special circumstance" under Code, s. 49 (12).

stated that, either two or three days after the dishonour of the bill, notice was given by letter to the defendant ; notice in two days being in time, but notice on the third too late. Lord Ellenborough : " The witness says two or three days, but the third day would be too late. It lies upon you to show that notice was given in due time, and I cannot go upon probable evidence without positive proof of the fact. Nor can I infer due notice from the non-production of the letter ; the only consequence is, that you may give parol evidence of it. The *onus probandi* lies upon the plaintiff, and, since he has not proved due notice, he must be non-suited " (*q*). So it lies on the plaintiff to show that notice was given and received before action brought. Therefore, where the notice was given and the action brought on the same day, the plaintiff was non-suited, because he did not show by affirmative evidence that the notice was received before the writ issued (*r*).

Each indorser has the like time to transmit notice.

When there are several indorsers, the time within which each is entitled to notice of dishonour depends on the parties by whom and to whom the notice is given, and will therefore be more conveniently discussed after we have considered the parties who are to give and receive notices (*s*).

Fifthly, we are to consider by whom the notice ought to be given.

BY WHOM
NOTICE
SHOULD BE
GIVEN.

Notice of dishonour must be given by or on behalf of the holder, or by or on behalf of an indorser then liable on the bill or note (*t*).

The object of notice is twofold : first, to apprise the party to whom it is addressed of the dishonour ; and, secondly, to inform him that the holder, or party giving the notice, looks to him for payment. Hence it follows that notice can only be given by some party to the instrument, though he need not be the *actual holder* of the bill at the time (*u*), but that a stranger is incompetent to give it (*x*). And it has been held by Lord Eldon, that notice by the first indorsee, who had not himself received notice from the second indorsee,

(*q*) *Lawson v. Sherwood*, 1 Stark. 314.

(*r*) *Custique v. Bernabo*, 14 L. J., Q. B. 3 ; 6 Q. B. 498.

(*s*) Code, s. 49 (14).

(*t*) Code, s. 49 (1) ; *Tindal v. Brown*, 1 T. R. 167 ; 1 R. R. 171.

(*u*) *Chapman v. Keane*, 3

Ad. & E. 193 ; 4 N. & M. 607 ; *Harrison v. Ruscoe*, 15 L. J., Exch. 110 ; 15 M. & W. 231 ; *Lysaght v. Bryant*, 19 L. J., C. P. 160 ; 9 C. B. 46.

(*x*) *Stewart v. Kennett*, 2 Camp. 177 ; 11 R. R. 690.

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and who was not, therefore, obliged to take back the bill, was insufficient as between the second indorsee and the drawer (*y*). And it seems clear, that even a party to the bill, who has been already discharged by *laches*, or who could not in any event sue, is incompetent to give notice (*z*). But a prior indorser who has himself received due notice may transmit it (*a*), though he may not know that the bill has been dishonoured (*b*).

In whose
favour notice
enures.

Notice by the holder enures in favour of all subsequent holders, and of all prior indorsers having a right of recourse against the party receiving it, *i.e.*, in general all indorsers subsequent to that party.

Notice by an indorser entitled to give it (*i.e.*, then liable on the bill or note) enures for the benefit of the holder and all indorsers subsequent to the party receiving it, and the same seems to be the effect of a waiver of notice.

So that a notice by the last indorsee to the drawer will operate as a notice from each indorser to the drawer ; and if the payee or first indorsee has duly received notice, or has not been discharged by *laches*, a notice by him to the drawer will be equivalent to a notice from each indorser, and from the holder to the drawer (*c*). And a notice from an intermediate party, may, in pleading, be described as a notice from the plaintiff (*d*).

There are two *Nisi Prius* cases (*e*) to be found in the books, in which Lord Kenyon and Lord Ellenborough are reported to have held respectively, that notice of dishonour from the acceptor himself was equivalent to notice by the holder. But it is conceived that in those cases the holder must have constituted the acceptor his agent for the purpose of giving notice, or that they are not law, being at variance with the general principle laid down in *Tindal v. Brown*, and recognized in a variety of subsequent cases (*f*).

(*y*) *Ex parte Barclay*, 7 Ves. 597 ; but quære, since the case of *Chapman v. Keane*, 3 Ad. & E. 193 ; 4 N. & M. 607, unless the party giving the notice had been already discharged by *laches*.

(*z*) *Harrison v. Ruscoe*, 15 L. J., Exch. 110 ; 15 M. & W. 231. See post ; and see *Miers v. Brown*, 11 M. & W. 372.

(*a*) *Jameson v. Swinton*, 2 Camp. 373 ; 2 Taunt. 224 ; *Wilson v. Swabey*, 1 Stark. 34.

(*b*) *Jennings v. Roberts*, 24 L. J., Q. B. 102 ; 4 E. & B. 615.

(*c*) Code, s. 49 (3) and (4).

(*d*) *Newen v. Gill*, 8 C. & P. 367.

(*e*) *Shaw v. Croft*, Chit. 9th ed. 494 ; Selw. 9th ed. 332 ; *Rosher v. Kieran*, 4 Camp. 87.

(*f*) See *Baker v. Birch*, 3 Camp. 107 ; 13 R. R. 767 ; *Pickin v. Graham*, 1 C. & M. 725 ; 3 Tyrw. 923 ; 38 R. R. 738 ; *Harrison v. Ruscoe*, 15 L. J., Exch. 110 ; 15 M. & W. 231. The case of *Tindal v. Brown*, however, so far as it authorizes the conclusion that the party giving notice must be the *actual*

Notice of dishonour is not invalid because the person giving it did not know that the bill had been dishonoured. If a bill is dishonoured in fact, and the party to it unequivocally asserts that fact in a notice of dishonour, it is sufficient (*g*).

Notice of dishonour may be given by any agent who holds the bill as a banker or attorney, and in the agent's own name (*h*). And it has been held, that a notice given by a party to a bill in the name of an indorser, but without his authority, is good (*i*). By an agent.

But a tradesman's foreman or servant is not necessarily such an agent as can give a good notice (*k*).

A creditor who holds a bill as a collateral security is bound to present and give notice of dishonour, and is liable for the consequences if he omit to do so (*l*). By a pledgee.

Sixthly, to whom notice is to be given.

TO WHOM.

The drawer and each indorser are entitled to notice. The drawer of a bill payable to a third party is also entitled to notice. The drawee or acceptor is not entitled, nor is the maker of a promissory note (*m*).

It is the safest course for the holder to give notice himself to all the parties against whom he may wish to proceed within the time within which he is, by law, required to give it to his immediate indorser; for, if he merely give notice to his immediate indorser, and it be not regularly transmitted to the antecedent parties, they are discharged: and, even if it be so transmitted, the evidence required to trace the notice back to a remote party is more voluminous, and may be difficult to procure. But if, where there are several indorsements, notice of the dishonour be given by the holder to his immediate indorser, and to him only, but an unbroken chain of notices, each given in due time, hang regularly from indorsee to indorser, back to a distant indorser or to the drawer, the latter is liable either to his indorsee or to the holder. Thus, where all the parties lived

holder is now overruled. *Chapman v. Keane*, 3 Ad. & E. 193; 4 N. & M. 607.

(*g*) *Jennings v. Roberts*, 4 E. & B. 615.

(*h*) *Woodthorpe v. Lawes*, 2 M. & W. 109; *Rowe v. Tipper*, *infra*. As to the effect of a misdescription of his principal by

the agent, see ante, p. 229, as to the form of notice. Code, s. 49 (2).

(*i*) *Rogerson v. Hare*, 1 Jur. 1; Code, s. 49 (2).

(*k*) *East v. Smith*, 16 L. J., Q. B. 292; 4 D. & L. 744.

(*l*) *Peacock v. Pursell*, 14 C. B. N. S. 728; 32 L. J., C. P. 266.

(*m*) Code, s. 52 (3).

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in London, and the holder on the day of dishonour gave notice to the fifth indorser, and the fifth on the following day to the fourth, he, on the day after, to the third, the third on the next day to the second, and the second on the following day to the first, it was held in an action by the second against the first indorser, that due notice had been given (*n*). And it would also have been sufficient in an action, by the holder at the time of dishonour, against the fifth indorser, and in an action by the fifth indorser against the first (*o*). But, if there be any *laches* in the circulation of the notice back through the several parties, even, though the neglect of one be compensated by the extraordinary diligence of another, *laches* once committed discharges all the antecedent parties, and subsequent notices are invalid, for they are given by parties who are no longer liable on the bill (*p*). “It is not enough that the drawer or indorser receives notice in as many days as there are subsequent indorsers, unless it is shown that each indorsee gave notice within a day after receiving it; as if any has been beyond the day, the drawer and prior indorsers are discharged” (*q*). Nor can a party, in such a case, by waiving his own discharge, waive the discharge of antecedent parties. Defendant was the eighth, plaintiff the eleventh, indorser of a bill. The instrument passed through several subsequent hands, was dishonoured at maturity, and returned to the immediate indorsee of the plaintiff. It remained in his hands three days, and then the plaintiff paid it, and gave notice to the defendant, who received the notice in a shorter interval from the day of dishonour than would have elapsed had each party through whose hands the bill was returned taken the full time allowed by law for giving notice. Abbott, C.J.: “In this case the plaintiff was clearly discharged by the *laches* of the holder. Then can he, by paying the bill, place the prior indorsers in a worse situation than that in which they would otherwise have been? I think he cannot do so, and that in paying this bill he has paid it in his own wrong, and cannot be allowed to recover upon it against the defendant” (*r*).

(*n*) *Rowe v. Tipper*, 13 C. B. 249; *Hilton v. Shepherd*, 6 East, 14.

(*o*) *Smith v. Mullett*, 2 Camp. 208; 11 R. R. 694; *Marsh v. Maxwell*, 2 Camp. 210; 11 R. R. 696, n.; *Jameson v. Swinton*, 2 Camp. 373; 2 Taunt. 224; *Wilson v. Swabey*, 1 Stark. 34.

(*p*) *Harrison v. Ruscoe*, 15

L. J., Exch. 110; 15 M. & W. 234.

(*q*) Per Lord Ellenborough, in *Marsh v. Maxwell*, 2 Camp. 210, n.; 11 R. R. 696, n.; *Smith v. Mullett*, 2 Camp. 208; 11 R. R. 694. See *Rowe v. Tipper*, 13 C. B. 249.

(*r*) *Turner v. Leach*, 4 B. & Ald. 451; 23 R. R. 344.

Notice of Dishonour.

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As notice may be given by leaving it at the counting-house, so notice to an agent for the general conduct of business is sufficient notice to the principal (s). But notice to a man's attorney or solicitor is not sufficient (t). A verbal message left at the drawer's house with his wife has been held sufficient. "A person, not a merchant," says Bolland, B., "who draws a bill of exchange, undertakes to have some one at his house to answer any application that may be made respecting it when it becomes due" (u).

To an agent
or attorney.

If the drawer or indorser of a bill become bankrupt, notice must nevertheless be given either to him or his trustee if one be appointed (x). Where a bankrupt had absconded, and no trustee had been appointed, notice was held sufficient if given to the petitioning creditor and to a messenger in possession; but now, in such a case, notice, if after reasonable diligence it was found it could not be given, would probably be dispensed with, or the delay excused (y).

To a bank-
rupt.

If the drawer or indorser be dead to the knowledge of the party seeking to give notice, it should be given to the personal representative if there be one, and with reasonable diligence he can be found (z).

When the
party is dead.

Whether the acceptance of a bill be general or qualified, it is not necessary to give the acceptor, or the maker of a note, notice of dishonour, nor to protest the bill. "Bills of exchange," says Abbott, C. J., "of late years have been made payable by the acceptor, either at the houses of his friends or agents, they being expressly named in the acceptance, or at banking houses, or at houses merely described by their number in a certain street. It is most convenient that the same rule should be laid down as applicable to all these cases. The most plain and simple rule to lay down is this: that the effect of an acceptance in any of these forms, is a

Need not be
given to
acceptor or
maker.

(s) *Crosse v. Smith*, 1 M. & Sel. 545; 14 R. R. 529; Code, s. 49 (8).

(t) *Ibid.* Nor to a referee in case of need. *In re Leeds Bank*, 35 L. J., Chan. 33.

(u) *Houseto v. Cowne*, 2 M. & W. 348.

(x) Code, s. 49 (10); *Ex parte Baker*, L. R., 4 Ch. D. 795; *Ex parte Moline*, 19 Ves. 216; *Rhode v. Proctor*, 4 B. & C. 517; 6 D. & Ry. 610; 28 R. R. 359; *Ex parte Johnson*, 3 Deac. & Chitty, 433; 1 Mont. & Ayr. 622; *Ex*

parte Chappell, 3 M. & Ayr. 490; 3 Dea. 298.

(y) Code, s. 50 (2) a. So in Scotland notice must have been given to the party who represents the estate. *Thomp.* 535.

(z) Code, s. 49 (9). So decided in America. And if there be no personal representatives, a notice sent to the residence of the deceased party's family is sufficient. *Merchants' Bank v. Birch*, 17 Johnson, R. 25; Bayley, American edition, 418.

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substitution of the house, banker, or other person therein mentioned, for the house or residence of the acceptor, and, consequently, that the presentment at the house, or to the party named in the acceptance, is equivalent to presentment at the house of the acceptor. This rule will, I think, be equally applicable to the case of every acceptance, and will be convenient and advantageous to the public" (a). *A fortiori*, it is unnecessary to have given the acceptor such a notice in any action against the drawer (b).

To parties
jointly liable.

Where two or more parties are jointly liable on a bill or note, as drawers or indorsers, notice must be given to each, unless they be partners, or one have authority to receive notice for all (c).

To a trans-
feror not in-
dorsing.

If a man, not a party to a bill, assign without indorsement, he is not entitled to notice of dishonour (d).

And, as a general rule, a man transferring by delivery without indorsement a bill or note payable *to bearer* is not entitled to notice.

We have already seen (e), that a transferor by mere delivery of a negotiable instrument, made or become payable to bearer, is not in general liable, either on the instrument or on the consideration. He, therefore (unless in some excepted cases), requires no notice of dishonour.

But we have also seen, that if the bill or note payable to bearer were delivered on account of a pre-existing debt that delivery is not, *primâ facie*, a sale of the bill or note. On dishonour, therefore, of the bill or note, the liability of the transferor for the original debt revives. But in such a case the transferee will have made the bill or note his own, unless he have given due notice of dishonour.

(a) Code, ss. 52 (3) and 89; *Treacher v. Hinton*, 4 B. & Ald. 413; 23 R. R. 325; *Smith v. Thatcher*, 4 B. & Ald. 200; *Pearse v. Pemberthy*, 3 Camp. 261.

(b) *Edwards v. Dick*, 4 B. & Ald. 212; 23 R. R. 255.

(c) Code, s. 49 (11); Partnership Act (1890), s. 16; *Porthouse v. Parker*, 1 Camp. 83; 10 R. R. 637; *Bignold v. Waterhouse*, 1 M. & Sel. 259. But it is conceived that notice to a private member of a joint stock banking company would not suffice. See *Powles v. Page*, 3 C. B. 16; *In re Carew*, 31 Beav. 39.

Mr. Justice Story doubts whether, in the case of joint parties not partners, notice to one only would bind even him. Story on Promissory Notes, p. 36. And such seems to be the effect of Code, s. 49 (11).

(d) *Van Wart v. Woolley*, 3 B. & C. 439; 5 D. & R. 374; M. & M. 520; *Swinyard v. Bowes*, 5 M. & Sel. 62; 17 R. R. 274. But a notice has been held to be in time, although an allowance be made for its transmission through a party not indorsing. See *Clode v. Bayley*, 12 M. & W. 51.

(e) Ante, Chapter on TRANSFER.

And we have further seen, that as there may be an express contract that the instrument shall not amount to payment, if dishonoured, so there are many circumstances from which a jury may infer that the intention and understood contract of the parties was, that the instrument was not to be payment, if dishonoured (*f*).

It is conceived that in all cases where, in consequence of the dishonour of bills or notes, made or become payable to bearer, a remedy arises on the consideration, the transferor is entitled to notice of dishonour (*g*).

A man merely guaranteeing the payment of a bill, but not a party to it, is not discharged by the neglect of the holder to give him notice of dishonour unless he has been actually prejudiced by such neglect (*h*). When to a guarantor.

And though a man indorse a bill, yet if he also give a bond conditioned for its payment, absence of due notice of dishonour is no plea to an action on the bond (*i*). To an indorser giving a bond.

(*f*) "If a person," says Abbott, C. J., "deliver a bill to another, without indorsing his own name upon it, he does not subject himself to the obligations of the law merchant; he cannot be sued on the bill, either by the person to whom he delivers it, or by any other. And, as he does not subject himself to the obligations, we think he is not entitled to the advantages. If the holder of a bill sell it without his own indorsement, he is, generally speaking, liable to no action in respect of the bill. If he deliver it without his indorsement upon any other consideration, antecedent or concomitant, the nature of the transaction and all circumstances regarding the bill must be inquired into in order to ascertain whether he is subject to any responsibility. If the bill be delivered, and received as an absolute discharge, he will not be liable; if otherwise, he may be. The mere fact of receiving such a bill does not show it was received in discharge." *Van Wart v. Woolley*, 3 B. & C. 445.

(*g*) There is great confusion in

the cases on this subject, but the authorities are canvassed in the judgment of Mr. Justice Coleridge, in *Turner v. Stones*, 1 Dowl. & L. 131. That learned judge says, "I think the obligation on the holder is to give notice promptly to the party from whom he receives the note." And see *Smith v. Mercer*, L. R., 3 Ex. 51; 37 L. J., Ex. 24.

(*h*) *Warrington v. Furber*, 8 East, 242; 6 Esp. 89; *Philips v. Astling*, 2 Taunt. 206; 11 R. R. 547; *Swinyard v. Bowes*, 5 M. & S. 62; *Holbrow v. Wilkins*, 1 B. & C. 10; 2 D. & Ry. 59; 25 R. R. 285; *Van Wart v. Woolley*, 3 B. & C. 439; 5 Dowl. & R. 374; M. & M. 220; *Walton v. Mascall*, 13 M. & W. 72; *Hitchcock v. Humphrey*, 5 M. & Gr. 559. A man guaranteeing the payment of a bill, where the proved local custom is to do so instead of indorsing, can recover against the acceptor, *Ex parte Bishop*, L. R., 15 Chan. D. 400, just as if he had indorsed.

(*i*) *Murray v. King*, 5 B. & Ald. 165.

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XV.CONSE-
QUENCES OF
NEGLECT.

Let us now inquire, seventhly, what are the consequences of neglect to give due notice. The law presumes that, if the drawer has not had due notice, he is injured, because, otherwise, he might have immediately withdrawn his effects from the hands of the drawee, and that, if the indorser has not had timely notice, the remedy against the parties liable to him is rendered more precarious. The consequence, therefore, of neglect of notice is, that the party to whom it should have been given is discharged from all liability, whether on the bill or on the consideration for which the bill was paid (*k*).

The old doctrine on this subject was, that it lay on the defendant to prove that he had been injured by the want of notice (*l*); but it is now settled that the want of notice is a complete defence, and that evidence tending to show the defendant was not prejudiced by the neglect is inadmissible, except in an action against the drawer who had no effects in the hands of the drawee (*m*). And if a man who is discharged for want of notice, nevertheless pays the bill, he cannot recover against prior parties. But where an agent drew a bill on his principal for goods bought by the agent for the principal, and the bill was dishonoured, of which the agent had no notice, but the agent, being afterwards arrested on the bill, paid it, and sued his principal on the contract of indemnity, which the law implies in favour of the agent in such cases; it was held, that the agent's not having insisted on the absence of notice as a defence to the action against himself, did not preclude him from recovering the amount of the bill against his principal (*n*).

WHAT
EXCUSES
NOTICE.

Delay.

But, eighthly, and lastly, there are cases in which notice is excused or waived, or delay in giving it is excused.

Delay in giving notice of dishonour is excused when not attributable to the neglect or misconduct of the party himself; but it must be given as soon as the cause of delay ceases to operate (*o*). Delay in the post-office, as we have seen, does not prejudice the sender.

Waiver.

Notice of dishonour may be dispensed with by waiver express or implied by the party entitled to it, either before

(*k*) *Bridges v. Berry*, 3 Taunt. 130; 12 R. R. 618; Code, s. 48.

(*l*) *Mogadara v. Holt*, 1 Show. 317; 12 Mod. 15.

(*m*) *Deinis v. Morrice*, 3 Esp. 158; *Hill v. Heap*, D. & R., N. P. C. 59; 25 R. R. 791; Code,

s. 50 (2), c. 4.

(*n*) *Huntley v. Sanderson*, 1 C. & M. 467; 3 Tyr. 469; 38 R. R. 663.

(*o*) Code, s. 50 (1); and see *Studdy v. Beesty*, 60 L. T. 647.

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or after the time for giving it. Thus, where the drawer stated to the holder a few days before the bill became due that he would call and see if the bill had been paid by the acceptor, it was held that he had dispensed with notice (*p*).

Notice of dishonour is dispensed with where, after the exercise of reasonable diligence, it cannot be given to or does not reach the drawer or indorser.

If impossible.

It is also dispensed with as regards the drawer in the following cases :—

As regards
the drawer.

Where drawer and drawee are the same person : or

Where the drawee is a fictitious person, or one incapable of contracting on a bill or note (in any of which cases the holder may treat the drawer as maker of a note, and therefore not entitled to notice, Code, s. 5 (2)) :

Where the drawer is the person to whom the bill is presented for payment : this apparently is directed to cases where the drawer is the party accommodated on a bill to the knowledge of the holder ; but it may perhaps make presenting a bill to the drawer equivalent to formal notice of dishonour, as in sect. 49 (6) the return of a dishonoured bill is so treated distinctly :

Where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay :

And, finally, where the drawer has countermanded payment (*q*).

The drawee will be under no obligation to accept or pay, if the drawer had no effects at any time during the currency of the bills in the hands of the acceptor, and will have no remedy against the acceptor or any other person if he be obliged to pay the bill ; not being therefore prejudiced by want of notice, the drawer cannot set that up as a defence (*r*). But this decision, substituting knowledge for notice, has

Absence of
effects in
drawee's
hands.

(*p*) Code, s. 50 (2) b. ; *Phipson v. Kelner*, 4 Camp. 285 ; 1 Stark. 116 ; see *Burgh v. Legge*, 5 M. & W. 418 ; and *Brett v. Lerett*, 13 East, 214 ; but see *Ex parte Big-nold*, 1 Deac. 728 ; *Murray v. King*, 5 B. & Ald. 165 ; *Seward v. Palmer*, 2 Moore, 274 ; 8 Taunt. 277 ; 19 R. R. 515. Waiver of notice seems to enure for and against the same parties as notice itself, *Coulcher v. Toppin*, 2 T. L. R. 657.

(*q*) Code, s. 50 ; *Hill v. Heap*, D. & R., N. P. C. 57 ; 25 R. R. 791 ; *Prideaux v. Collier*, 2 Stark. 57 ;

but this does not excuse presentment for payment, even if with the holder's knowledge ; Code, s. 46.

(*r*) *Bickerdike v. Bollman*, 1 T. R. 406 ; 1 R. R. 242 ; *Lafitte v. Slatter*, 6 Bing. 623 ; *Carew v. Duckworth*, L. R., 4 Ex. 313 ; *Wirth v. Austen*, L. R., 10 C. P. 689. Absence of effects will excuse presentment for payment as against the drawer, or an accommodated indorser. Code, s. 46 (2) c and d. Hence, where a cheque is dishonoured for want of funds, the drawer is chargeable without

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been much regretted. "I have always thought," says Abbott, C. J., "that it would have been better never to have considered knowledge as equivalent to notice: I cannot consent to carry the law one step further" (*s*). Therefore it has been held, that, in order to be liable without notice, the drawer must have had no remedy against the acceptor or any other person. Hence, if a bill be drawn for the accommodation, not of the drawer, but of the acceptor, as the drawer might sue the acceptor he is entitled to notice (*t*). And if the drawer in such a case choose to pay without notice, he cannot sue the acceptor for *money paid* to his use, although he may sue on the bill (*u*). And where a bill was drawn for the accommodation of an indorsee, and neither such indorsee nor the drawer had any effects in the hands of the acceptor, it was held that a subsequent indorsee, in order to recover against the drawer, was bound to give him notice, for the drawer had a remedy over against his immediate indorsee (*x*). So, it is no excuse for neglect of notice *to an indorser*, that the drawer had no effects in the acceptor's hands. "That circumstance," says Lord Kenyon, "will not avail the plaintiff,—the rule extends only to actions brought against the drawer; the indorser is in all cases entitled to notice, for he has no concern with the accounts between the drawer and the drawee" (*y*). Nor will the absence of effects in the hands of the maker of a *promissory note* be any excuse for want

either presentment for payment or notice of dishonour, unless he had a reasonable expectation that it would be honoured. In America a cheque dishonoured for want of funds may be treated by the holder as a nullity or a fraud. Byles on Bills, 6th American edition, pp. 37 and 450.

(*s*) *Cory v. Scott*, 3 B. & Ald. 619; *Carter v. Flower*, 16 M. & W. 749.

(*t*) *Ex parte Heath*, 2 Ves. & B. 240; 2 Rose, 141; *Cory v. Scott*, 3 B. & Ald. 619; Bayley, 294, 5th ed.; *Sleigh v. Sleigh*, 19 L. J., Exch. 345; 5 Exch. 514.

(*u*) *Sleigh v. Sleigh*, 19 L. J., Exch. 345; 5 Exch. 514.

(*x*) *Norton v. Pickering*, 8 B. & C. 610; 3 Man. & R. 23; Dans. & L. 210; *Cory v. Scott*, 3 B. & Ald. 619, overruling *Walwyn v. Quintin*, 1 B. & P. 652; and see *Brown v. Maffey*, 15 East, 216;

Ex parte Heath, 2 Ves. & B. 240; 2 Rose, 141.

And the indorser is entitled to notice, although the bill were drawn and accepted, and indorsed by him for the purpose of raising funds for a company in which he as well as the holder was a shareholder. *Maltass v. Siddle*, 6 C. B., N. S. 494.

(*y*) *Wilks v. Jacks*, Ieake, 202; *Foster v. Parker*, L. R., 2 C. P. D. 18. But if the indorser have had funds put into his hands by the drawer, out of which he is to pay the bill, notice to the indorser is unnecessary. *Corney v. Mendez da Costa*, 1 Esp. 302; *Carter v. Flower*, 16 M. & W. 751. Where the intention of the parties to an accommodation bill was that the last indorser should meet it, the previous indorsers were held entitled to notice. *Turner v. Sanson*, L. R., 2 Q. B. D. 23.

of notice to the indorser, at all events unless the indorser be the person who is to pay, and who has no remedy over against any one (z) ; nor will it suffice to allege that he has not been damnified by the absence of notice. An intimation from the drawee that he cannot meet the bill, but that the drawer must take it up, will not relieve the holder from the necessity of giving the drawer notice (a). But if the acceptor give the drawer money for that purpose, such sum is recoverable from the drawer by the holder, as money paid to his use (b). Though the acceptor, at the time of dishonour, have no effects of the drawer in his hands, yet, if he ever had any after the drawing of the bill, or if, without effects, the drawer had any reasonable ground for expecting that the bill would be honoured, he is entitled to notice. "The case of *Bickerdike v. Bollman*," says Lord Ellenborough, "went upon the ground, that the drawer had no effects in the hands of the drawee *at the time of the bill drawn*, and the other cases followed on the same ground. But no case has gone the length of extending the exemption further to cases where the drawee had effects of the drawer in his hands at the time of the bill drawn, though the balance might vary afterwards, and be turned into the opposite scale. When there are no effects of the drawer in the hands of the drawee at the time when the bill is drawn, the drawer must know that he is drawing on accommodation ; but, if he have effects at the time, it would be very dangerous and inconvenient, merely on account of the shifting of a balance, to hold notice not to be necessary. It would be introducing a number of collateral issues in every case upon a bill of exchange, to examine how the account stood between the drawer and the drawee, from the time the bill was drawn down to the time it was dishonoured" (c). Where the drawer had goods in the hands of drawees to the amount of 1,500*l.* but owed them 10,000*l.*, and the drawees had appropriated the goods to the satisfaction of the debt, it was held, that notice of dishonour to the drawer was still essential. Lord Ellenborough observing—"If a man draws upon a house with whom he has no account, he knows that the bill will not be accepted ; he can suffer no injury from want of

(z) *Carter v. Flower*, 16 M. & W. 751.

(a) *Stables v. O'Kines*, 1 Esp. 332.

(b) *Baker v. Birch*, 3 Camp. 107 ; 13 R. R. 767.

(c) *Orr v. Maginnis*, 7 East,

359 ; 2 Smith, 328 ; *Legge v. Thorpe*, 12 East, 171 ; *Brown v. Maffey*, 15 East, 216 ; *Hammond v. Dufrene*, 3 Camp. 145 ; *Thackray v. Blakett*, 3 Camp. 164 ; 13 R. R. 783.

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notice of its dishonour ; and, therefore, he is not entitled to such notice. But the case is quite otherwise where the drawer has a fluctuating balance in the hands of the drawee. There notice is peculiarly requisite. Without this, how can the drawer know that credit has been refused him, and that his bill has been dishonoured ? It is said here, that the effects in the hands of the drawees were all appropriated to discharge their own debt ; but that appropriation should appear by writing (*d*), and the defendant should be a party to it " (*e*).

Where there was reasonable expectation that the bill would be honoured.

And, in general, though the drawer had no effects in the hands of the drawee, yet if he had any reasonable expectation that the bill would be honoured, he has been held entitled to notice of dishonour, as if he have consigned goods to the drawee, though, in fact, they never came to hand, or have accepted bills for him (*f*). So where R., being indebted to the drawer, represented to him that A. owed him money, and the drawer in consequence drew a bill on A., which A. accepted, but did not pay, it was held, that the drawer was entitled to notice of dishonour ; for he had reason to expect either that R. would take up or that the acceptor would pay the bill, and might by want of notice be induced to relax in his endeavours to procure payment of the debt owing by R. (*g*). But the drawer of a bill, who has no effects in the hands of the drawee, except that he has supplied him with goods on credit, which credit does not expire till long after the bill becomes due, is not entitled to notice, for the goods are not such as can properly be set

(*d*) *Quære*, as to the necessity of a writing.

(*e*) *Blackhan v. Doren*, 2 Camp. 503 ; 11 R. R. 779.

(*f*) *Legge v. Thorpe*, 12 East, 171 ; *Rucker v. Hillier*, 16 East, 43 ; 3 Camp. 217 ; 14 R. R. 278 ; *Spooner v. Gardiner*, 1 R. & M. 84 ; *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652 ; *Ex parte Heath*, 2 Ves. & B. 240. It should be noticed that the Code does not in s. 50 (2) c (4), introduce the phrase which appears in s. 46 (2) c : "and the drawer has no reason to believe that the bill would be paid," hence these cases may not be of the same authority as heretofore. In *Rucker v. Hillier*, 3 Camp. 217 ; 14 R. R. 278 ; Lord Ellenborough points out

the distinction between "visionary paper" and drafts when the drawer "has a solid belief" that the bill would be honoured ; in the former case he cannot be injured by want of notice, whereas in the latter he may not only wish to withdraw his effects or stop further consignments, but also have to make arrangements to meet the bill.

(*g*) *Lafitte v. Slatter*, 6 Bing. 623 ; 4 M. & P. 457 ; 31 R. R. 510. The burthen of proving that the defendant has been injured by receiving no notice, where that is alleged, but where it is proved that he had no funds in the hands of the acceptor, lies on the defendant. *Fitzgerald v. Williams*, 6 Bing. N. C. 68 ; 8 Scott, 271.

against the drawing, nor can there be any reasonable expectation that the bill will be paid till the expiration of the credit (*h*).

If the drawer of a bill make it payable at his own house, this is evidence to go to the jury that it is a bill drawn for the accommodation of the drawer himself, of the dishonour of which it is not necessary to apprise him. "I cannot understand," says Lord Tenterden, "why the drawer should with his own hand make the bill payable at his own house, unless he was to provide payment of it when at maturity" (*i*).

Notice of dishonour is also dispensed with as regards an indorser in the following cases :—

As regards an indorser.

Where the indorser knew at the time that the drawee was fictitious, or a person incapable of contracting on a bill or note :

Where the indorser was the party accommodated :

And where the indorser is the party to whom the bill is presented for payment (*k*).

Ignorance of a party's residence will excuse neglect to give notice of dishonour, so long as that ignorance continues without neglecting to use the ordinary means for acquiring information. "It would be very hard," observes Lord Ellenborough, "when the holder of a bill does not know where the indorser is to be found, if he lost his remedy by not communicating immediate notice of the dishonour of the bill, and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive and contented ignorance ; but, if he

Ignorance of party's residence.

(*h*) *Claridge v. Dalton*, 4 M. & Sel. 226 ; 16 R. R. 440. As to the form of the allegation in pleading, see *Thomas v. Fenton*, 16 L. J., Q. B. 362 ; 5 D. & L. 28.

(*i*) *Sharp v. Bailey*, 9 B. & C. 44 ; 4 M. & R. 4 ; 32 R. R. 567. *Quære*, whether notice of dishonour be necessary, where the drawer dies before maturity, and an indorser is sued who is the drawer's executor. See *Caunt v. Thompson*, 18 L. J., C. P. 127 ; 7 C. B. 400.

(*k*) Code, s. 50 (2) d. It may be noticed that this section differs slightly from sect. 50 (2) c, which relates to a drawer. Perhaps the reason may be this ; a drawer

can hardly draw a bill payable at his own house without leading people to infer that it is an accommodation bill, but it does not follow that the drawer is the party accommodated, it may well be for the accommodation of the payee the first indorser, hence, perhaps, the variance in expression. A drawer may still, as before, draw a bill payable at his own house or address, see Code, s. 51 (6) b. Where an indorser is the party accommodated, notice of dishonour, though excused in this case, must be given to previous indorsers. *Turner v. Sanson*, L. R., 2 Q. B. D. 23.

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uses reasonable diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered, is due notice of the dishonour of the bill, within the usage and custom of merchants" (l). Where the holder, in order to discover the residence of the indorser, had merely made inquiries at a certain house where the bill was made payable, Lord Ellenborough said, "Ignorance of the indorser's residence may excuse the want of due notice, but the party must show that he has used reasonable diligence to find it out. Has he done so here? How should it be expected that the requisite information should have been obtained where the bill was payable? Inquiries might have been made of the other persons whose names appeared on the bill, and application might have been made to persons of the same name with the defendant whose addresses are set down in the Directory" (m). Due diligence has, however, been held to be a question of fact (n). After the residence of the party is discovered, the holder has the same time to give notice as he would have had in the first instance (o).

In case of
accident.

Nemo ad impossibile tenetur; and, therefore, it should seem, on general principles, that the death or dangerous illness of the holder or his agent, or other accident not attributable to the holder's negligence, rendering notice impossible, may excuse it, or delay in giving it (p). But, where an indorser left home on account of the dangerous illness of his wife, at a distance, and a letter containing

(l) *Bateman v. Joseph*, 2 Camp. 463; 12 East, 433; 11 R. R. 443; *Browning v. Kinnear*, Gow, 81; *Harrison v. Fitzhenry*, 3 Esp. 240; *Baldwin v. Richardson*, 1 B. & C. 245; 2 D. & R. 285; 25 R. R. 883. In this last case the traveller of a tradesman received in the course of business a promissory note, which was afterwards dishonoured. The principal, not knowing the address of the next preceding indorser, wrote to his traveller to inquire into it, and several days elapsed before he received an answer. He then gave notice, and it was held sufficient. See *Chapcott v. Curlewis*, 2 Moo. & Rob. 484; 7 M. & R. 404, p. 33.

(m) *Bertridge v. Burgis*, 3 Camp. 262; 13 R. R. 798.

(n) *Bateman v. Joseph*, 12

East, 433; 2 Camp. 463; 11 R. R. 443; *Hilton v. Shepherd*, 6 East, 14, n.; *Siggers v. Browne*, 1 M. & Rob. 520; *Hewitt v. Thompson*, 1 M. & Rob. 543. In these two last cases, the letters containing notice of dishonour had miscarried, and the jury were directed to consider whether the generality or indistinctness of the description which the defendant had given of himself in the bill had led the plaintiff into error.

(o) *Firth v. Thrush*, 8 B. & C. 387; 2 M. & R. 359; Dans. & L. 151; 32 R. R. 421; *Allen v. Edmundson*, 17 L. J., Exch. 291; 2 Exch. 719; *Dixon v. Johnson*, 1 Jur., N. S. 70.

(p) Poth. 144; Pardessus du Contrat de Change, 426; Thompson, 483, 548; Code, s. 50 (2) a.

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notice of dishonour of a bill lay unopened at his shop during his absence, till after the proper time for giving his indorser notice, Lord Ellenborough held that these circumstances afforded no excuse for the delay (*q*).

Where a bill is drawn by several persons upon one of themselves, since the acceptor is likewise a drawer, notice of dishonour is superfluous, as the dishonour must be known to one of them, and the knowledge of one is the knowledge of all (*r*).

The death, bankruptcy or insolvency of the drawee, however notorious, constitute no excuse for neglect of notice (*s*). Nor an agreement or understanding between the parties, that the instrument shall not be payable till after a certain event (*t*).

Notice of dishonour need not be given if the bill be on an insufficient stamp (*u*).

Nor to the indorser of a promissory note not negotiable (*x*).

The necessity of giving notice of dishonour may be waived by anticipation, or neglect or delay in giving it, subsequently to the omission, and such waiver may be express or implied. A subsequent promise to pay or admission of liability is such a waiver. "A promise to pay may operate either as evidence of notice of dishonour, or as a prior dispensation, or as a subsequent waiver of notice" (*y*). And a payment of part, or an acknowledgment of liability (*z*), though after action brought (*a*), will be evidence of notice (*b*).

Of bills drawn by several on one of themselves.

Death, bankruptcy, and insolvency of drawee.

Wherestamp insufficient.

Note not negotiable.

CONSEQUENCES OF
NEGLECT,
HOW WAIVED.

(*q*) *Turner v. Leach*, 4 B. & Ald. 451; 23 R. R. 344.

(*r*) *Porthouse v. Parker*, 1 Camp. 82; 10 R. R. 637. But in case of fraud a different rule would prevail. *Bignold v. Waterhouse*, 1 M. & Sel. 259. And it may be doubtful how far this rule would hold in the case of a joint stock company.

(*s*) *Russell v. Langstaffe*, 2 Doug. 514; *Esdaile v. Sowerby*, 11 East, 114; 10 R. R. 440; *Boulbee v. Stubbs*, 18 Ves. 21; 11 R. R. 141; but see 3 Bro. C. C. 1.

(*t*) *Free v. Hawkins*, 8 Taunt. 92; 1 Moore, 28.

(*u*) *Cundy v. Marriott*, 1 B. & Ad. 696; 35 R. R. 416.

(*x*) *Plimley v. Westley*, 2 Bing. N. C. 249; 2 Scott, 423;

1 Hodges, 324.

(*y*) Code, s. 50 (2) b; *Corlery v. Colville*, 32 L. J., C. P. 210.

(*z*) *Vaughan v. Fuller*, 2 Stra. 1246; *Horford v. Wilson*, 1 Taunt. 12; *Lundie v. Robertson*, 7 East, 231; 3 Smith, 225; *Brett v. Lerett*, 13 East, 213; *Wood v. Brown*, 1 Stark, 217; *Hopes v. Alder*, 6 East, 16, n.; *Dennis v. Morrice*, 3 Esp. 158; *Rogers v. Stephens*, 2 T. R. 713; 1 R. R. 605; *Dixon v. Elliott*, 5 C. & P. 437; *Margeson v. Aitken*, 3 C. & P. 338; Dans. & L. 157; *Lecan v. Kirkman*, 6 Jur., N. S. 17.

(*a*) *Hopley v. Dufresne*, 15 East, 275; 13 R. R. 463.

(*b*) Many of the cases, cited below, fail in drawing the proper distinction between the effect of a

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It makes no difference that such promise, payment or acknowledgment, were made under a misapprehension of the *law*, for every man must be taken to know the law (*c*); otherwise, a premium is held out to ignorance, and there is no telling to what extent this excuse might be carried (*d*). But if the promise or acknowledgment be made under a misapprehension of *fact*, as, if the bill had been presented for acceptance, and acceptance has been refused, a promise to pay, in ignorance of that circumstance, is no waiver of the consequence of *laches* (*e*). But a promise to pay will entirely dispense with proof of presentment or notice, and will throw on the defendant the double burthen of proving *laches*, and that he was ignorant of it (*f*). Where it is only as to part of the sum, the plaintiff can only avail himself of it as a waiver *pro tanto*. A drawer of a bill for 200*l.*, who had not received due notice of dishonour, said, "I do not mean to insist on want of notice, but I am only bound to pay you 70*l.*" Abbott, C. J., "The defendant does not say that he will pay the bill, but that he is only bound to pay 70*l.* I think the plaintiff must be satisfied with the 70*l.*" (*g*). The acknowledgment or promise may be made by the attorney for the defendant, or by his clerk, who has the management of the case (*h*). It need not be made to the plaintiff, but may be made to another party to the bill, or to a stranger (*i*). A promise to pay made by the drawer in expectation that a bill will be dishonoured, but before

promise, as a *waiver* of notice, and its effect as *evidence* of notice. In *Kilby v. Rochussen*, the Court held a subsequent promise to be sufficient evidence of due notice, but would have amended if necessary by adding an averment of waiver. 18 C. B. 357.

(*c*) Or, more correctly speaking, ignorance of the law cannot excuse.

(*d*) *Billie v. Lumley*, 2 East, 469; 6 R. R. 479.

(*e*) *Goodall v. Dolley*, 1 T. R. 712; 1 R. R. 372; *Blesard v. Hurst*, 5 Burr. 2672; *Williams v. Bartholomew*, 1 B. & P. 326; 4 R. R. 81; *Sterens v. Lynch*, 2 Camp. 332; 12 East, 38.

(*f*) *Taylor v. Jones*, 2 Camp. 105; 11 R. R. 677; *Sterens v. Lynch*, 12 East, 38; 2 Camp. 332. See instances of promises held insufficient in *Dennis v. Morrice*, 3 Esp. 158; *Cumming v. French*,

2 Camp. 106, n.; and see *Rouse v. Redwood*, 1 Esp. 156; *Standage v. Creighton*, 5 C. & P. 406; and *Borradaile v. Lowe*, 4 Taunt. 93, where it is said that an indorser can only be rendered liable by an express promise; and see *Pickin v. Graham*, 1 Cro. & Mec. 725; 3 Tyr. 923; 38 R. R. 738.

(*g*) *Fletcher v. Froggatt*, 2 C. & P. 569.

(*h*) *Standage v. Creighton*, 5 C. & P. 406.

(*i*) *Potter v. Rayworth*, 13 East, 417; *Gunson v. Metz*, 1 B. & C. 193; 2 D. & Ry. 334; *Fletcher v. Froggatt*, 2 C. & P. 569. In *Rabey v. Gilbert*, it was held that suffering judgment by default in an action at the suit of a second indorsee was evidence of notice or of a waiver of notice in an action by the first indorsee. 30 L. J., Exch. 171; 6 H. & N. 536.

it is dishonoured, does not dispense with notice; for it is to be understood as a promise on condition that due notice is given (*k*).

It seems, however, in some cases to have been considered, that a promise to pay is only evidence from which a jury may presume that a notice has been received (*l*). But that is not so. A promise to pay, if made before the time for giving notice has expired, is a dispensation; if made after that time it is a waiver, independently of any question of actual notice (*m*).

Though a party may waive the consequence of *laches* in respect of himself, he cannot do so in respect of antecedent parties (*n*).

No *laches* can be imputed to the Crown, and, therefore, if a bill be seized under an extent before it is due, the neglect of the officer of the Crown to give notice of the dishonour will not discharge the drawer or indorser (*o*).

Laches not imputable to the Crown.

A prior dispensation with notice, as absence of effects, must be specially alleged (*p*). So must the impossibility of giving notice, or any other excuse for not giving it (*q*). And a subsequent promise, when used as a waiver of notice, must also be specially pleaded (*r*). But a subsequent promise to pay, when used as evidence of the fact of notice, need not (*s*).

Pleading where notice is excused or waived.

After the bill is due, a promise to pay, or a part payment (*t*), or the offer of it (*u*), or any admission of

Evidence of notice.

(*k*) *Pickin v. Graham*, 1 C. & M. 725; 3 Tyr. 923; 38 R. R. 738; and see *Prideaux v. Collier*, 2 Stark. N. P. C. 57, and *Baker v. Birch*, 3 Camp. 107; 13 R. R. 767.

(*l*) *Hicks v. The Duke of Beaufort*, 4 Bing. N. C. 229; 5 Scott, 598; and see *Booth v. Jacobs*, 3 Nev. & M. 351; *Pickin v. Graham*, 1 Cro. & Mee. 728; 3 Tyr. 923; 38 R. R. 738; but see *Lundie v. Robertson*, 7 East, 231; 3 Smith, 225; *Haddock v. Bury*, 7 East, 236, n.; *Anson v. Bayley*, B. N. P. 276; *Hopley v. Dufresne*, 15 East, 275; 13 R. R. 463; *Norris v. Solomonson*, 4 Scott, 257.

(*m*) *Ordery v. Colville*, 32 L. J., C. P. 211; 14 C. B., N. S. 374; *Woods v. Dean*, 32 L. J., Q. B. 1; 3 Best & Smith, 101; *Kilby v.*

Rochussen, 18 C. B. 357.

(*n*) *Roscoe v. Hardy*, 12 East, 434; *Turner v. Lrach*, 4 B. & Ald. 451; 23 R. R. 344; *Marsh v. Maxwell*, 2 Camp. 210, n.; 11 R. R. 696, n.

(*o*) West on Extents, 28, 29.

(*p*) *Cory v. Scott*, 3 B. & Ald. 624; *Burgh v. Legge*, 5 M. & W. 418.

(*q*) *Allen v. Edmundson*, 17 L. J., Exch. 291; 2 Exch. 719.

(*r*) *Ordery v. Colville*, 32 L. J., C. P. 211.

(*s*) *Lundie v. Robertson*, 7 East, 231; *Gibbon v. Coggon*, 2 Camp. 188; 11 R. R. 692.

(*t*) *Horford v. Wilson*, 1 Taunt. 12.

(*u*) *Dixon v. Elliott*, 5 C. & P. 437.

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liability (*x*), whether before or after the period for giving notice has expired, is *prima facie* evidence of notice; but though there be no evidence to repel the inference, the jury are not *bound* to draw it (*y*). A letter from the defendant containing no promise of payment, but merely an ambiguous allusion to the bill being dishonoured, was held sufficient to warrant the jury in finding that the defendant had received due notice of dishonour (*z*). And the sending a person by the defendant, the drawer, to a remote indorsee two days after the bill had become due, to inform him that he, the drawer, had been defrauded of the bill, and that he should defend any action upon it, was left by Lord Tenterden to the jury as evidence to prove notice of dishonour (*a*). And a statement by the defendant that he should pay the bill, and not avail himself of the informality of the notice, has been held to be evidence of *due* notice (*b*). And a conditional promise to pay, although the condition be not complied with, is still evidence (*c*). Notice to produce a notice of dishonour is not necessary (*d*).

(*x*) *Jackson v. Collins*, 17 L. J., Q. B. 142; *Mills v. Gibson*, 16 L. J., C. P. 249; *Rabey v. Gilbert*, 6 H. & N. 536.

(*y*) *Bell v. Frankis*, 11 L. J., C. P. 300; 4 M. & G. 446.

(*z*) *Booth v. Jacobs*, 3 Nev. & M. 351.

(*a*) *Wilkins v. Jadis*, 1 Moo. & R. 41: and see *Curlewis v.*

Corfield, 1 Q. B. 814.

(*b*) *Brownell v. Bonney*, 1 Q. B. 39.

(*c*) *Campbell v. Webster*, 15 L. J., C. P. 4; 2 C. B. 258; but see *Pickin v. Graham*, 1 C. & M. 725; 3 Tyr. 923; 38 R. R. 738.

(*d*) *Swain v. Lewis*, 2 C. M. & R. 261; *Doe v. Somerton*, 14 L. J., Q. B. 210.

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ACCEPTANCE of a bill is the signification by the drawee of his assent to the order of the drawer ; or, in plain terms, a written engagement to pay the bill when due in money, and by no other means (a).

What it is.

(a) *Clark v. Cock*, 4 East, 72 ;
Russell v. Phillips, 14 Q. B. 891 ;
19 L. J., Q. B. 297 ; *Owen v.*

Von Uster, 10 C. B. 318 ; Code,
s. 17.
In *Decroix v. Meyer*, [1890]

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Before acceptance the drawee is not liable to the holder (*b*).

A draft dispensing with acceptance.

An instrument drawn by A. upon B., requiring him to pay to the order of C. a certain sum at a certain time "without acceptance," is still a bill of exchange, and may be so described in an indictment for forgery (*c*).

Liability of a banker at whose bank a bill is made payable by the acceptor.

A bill is often by the acceptor made payable at a banker's. By such a direction on a bill the banker may incur liabilities to his customer, and also a liability to the holder.

Liability to the customer.

We have already seen that, without acceptance, a banker may be liable to his customer, if, having sufficient funds, he neglect to pay his cheques. So a banker, at whose hands a customer accepting a bill makes it payable, may be liable to an action at the suit of that customer if he refuse to pay it, having at the time of presentment funds sufficient, and having had those funds a reasonable time, so that his clerks and servants might know it (*d*).

25 Q. B. D. 347, affirmed [1891] Ap. Ca. 520, Lord Esher questioned the right of the drawee to alter the form of the bill save in his acceptance. Six years later this *obiter dictum* of the Master of the Rolls was the base of the decision in *Scholfield v. Lord Londesborough*, [1896] Ap. Ca. 514; 65 L. J. 593, when it was held that the acceptor owed no duty to any one in regard to the form of the bill, over which, as Lord Macnaghten says, p. 546, "the drawer has the control, and censorship of the form is no part of the acceptor's duty." Hence the alleged negligence, even if it had been the proximate cause of the fraud, was not the acceptor's and the principle in *Young v. Grote*, 4 Bing. 253; 29 R. R. 552; did not apply. In this case will be found a full review by their lordships of all the important cases on fraudulent alteration reported and unreported.

(*b*) Code, ss. 23 and 53 (1). See, too, *Frith v. Forbes*, 31 L. J., Ch. 793; 32 L. J., Ch. 10. As cheques are not accepted, the holder cannot in England enforce

payment from the drawee; but in Scotland, by s. 53 (2), when the drawee of a bill has in his hands funds available for the payment thereof, the bill or cheque operates as an assignment of its amount from the time when it is presented to the drawee. See ante, p. 19.

(*c*) *Miller v. Thompson*, 3 M. & G. 576; *R. v. Kinnear*, 2 M. & Rob. 117; Com. Dig. Merc. F. 3.

(*d*) Ante, p. 19, and see *Whitaker v. The Bank of England*, 6 C. & P. 700, and 1 C., M. & R. 744; 1 Gale, 54; *Rolin v. Steward*, 14 C. B. 595; *Robarts v. Tucker*, 16 Q. B. 560.

In *Vagliano v. Bank of England*, [1891] Ap. Ca. 107; 60 L. J. 145, Lord Macnaghten points out that the usual contract between banker and customer is insufficient by itself to impose upon the former the duty of honouring his customer's acceptances made payable at his bank and thereby running the risk of paying on a forged indorsement, though that is a sufficient authority if he choose to do so.

Formerly, if he paid a holder whose title depended on a forged or unauthorised indorsement, he could not debit his customer with the payment (*e*). He was thus between two fires : if he refused to honour the cheque he was exposed to an action at the suit of his customer, and if he paid it, he took the risk of the indorsement not being valid or genuine. To obviate this hardship the 16 & 17 Vict. c. 59, s. 19, relieved him from the necessity of proving the validity of any indorsement on a draft on him to order on demand, thus enabling him to substantiate the payment against his customer. This section, though not repealed, is substantially reproduced in the Code, which gives the like relief to the banker in the case of a forged or unauthorised indorsement of any bill to order on demand drawn on him (*f*).

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Forged or un-
authorized
indorsement.

Where a bill is accepted payable at a banker's, though money had been remitted by the acceptor to the banker for the express purpose of paying the bill, the banker is not liable to the holder in an action for money had and received, unless he have assented to hold the money for the purpose for which it was remitted (*g*). But where there is anything in the conduct or situation of the banker which amounts to an assent to hold the remittance upon trust to discharge the bill, he is liable to the holder (*h*).

Liability to a
holder.

A bill can only be accepted by the drawee (*i*), and not by a stranger, except for honour (*k*). Where, indeed, the bill was not addressed to anyone, but only indicated the place of payment, the acceptor was held liable as having admitted

By whom it
may be
accepted.

(*e*) *Robarts v. Tucker*, 16 Q. B. 560.

(*f*) Code, s. 60. It may be doubtful whether this section has extended, or only better defined the protection; difference between a cheque and a bill of exchange on a banker on demand there is none in form, but the former is, in theory at all events, drawn against his balance by a customer, whose signature the banker is bound to recognise and honour; while the latter may be drawn by a stranger to whom the banker would be under no such obligation. The non-repeal of the former statute looks as if something new were intended, but what change has been made beyond the introduction of the word "forged" it is not easy to see.

B.B.E.

(*g*) *Williams v. Everett*, 14 East, 582; 13 R. R. 315; *Yates v. Bell*, 3 B. & Ald. 643; *Wedlake v. Hurley*, 1 C. & J. 83; 35 R. R. 688.

(*h*) *De Bernales v. Fuller*, 14 East, 590, n.; 2 Camp. 426; 11 R. R. 755; 13 R. R. 321, n.; and see the observations of Abbott, C. J., on this case, in *Yates v. Bell*, 3 B. & Ald. 643.

(*i*) Code, ss. 6 and 17; *Nichols v. Diamond*, 9 Exch. 157.

(*k*) *Polhill v. Walter*, 3 B. & Ad. 114; 1 L. J., K. B. 92; 37 R. R. 344. *Eastwood v. Bain*, 28 L. J., Ex. 74; 3 H. & N. 738; *Davis v. Clarke*, 13 L. J., Q. B. 305; 6 Q. B. 16; see *Jenkins v. Hutchinson*, 18 L. J., Q. B. 274; 13 Q. B. 744; Code, s. 17, and 65 (1).

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himself to be the party pointed out by the place of payment (*l*). But this decision goes to the very verge of the law (*m*).

If the drawee be fictitious or incompetent to contract, as, for example, by reason of infancy or coverture (*n*), the bill may be treated as dishonoured.

We have already seen that one partner may, by his acceptance, bind his co-partners. But, if a bill be drawn upon several persons not in partnership, it should be accepted by all, and, if not, may be treated as dishonoured (*o*). Acceptance will, however, be binding upon such of them as do accept (*p*).

Not by a
series of
acceptors.

There cannot be two or more separate acceptors of the same bill not jointly responsible. A. refused to supply B. with goods, unless C. would become his surety. C. agreed to do it. Goods to the value of 157*l.* were accordingly sold by A. to B. For the amount A. drew on B., and the bill was accepted both by B. and C., each writing his name on it. Lord Ellenborough: "If you had declared that, in consequence of A. selling the goods to B., C. undertook that the bill should be paid, you might have fixed C. by this evidence. But I know of no custom or usage of merchants according to which, if a bill be drawn upon one man, it may be accepted by two; the acceptance of the defendant is contrary to the usage and custom of merchants. A bill must be accepted by the drawee, or, failing him, by someone for the honour of the drawer. There cannot be a series of acceptors. The defendant's undertaking is clearly collateral, and ought to have been declared upon as such" (*q*). But, although there can be no other acceptor after a general acceptance of the drawee, it is said that, when a bill has been accepted *supra protest*, for the honour of one party, it may, by another individual, be accepted *supra protest*, for the honour of another (*r*).

(*l*) *Gray v. Milner*, 8 Taunt. 739; 21 R. R. 525.

(*m*) See the observations of Patteson, J., in *Davis v. Clarke*, *supra*; and of Martin, B., in *Peto v. Reynolds*, 9 Exch. 410.

(*n*) Code, s. 41 (2) a. The holder may also treat it as a note, in which case the drawer will, as maker, not be entitled to notice of dishonour. Sects. 5, 52 (3), and 89.

(*o*) Ante, p. 52; Mar. 16;

Dupays v. Shepherd, Holt's R. 297; Marius, 64.

(*p*) B. N. P. 270; Bayley, 58; *Owen v. Von Uster*, 10 C. B. 318; *Nichols v. Diamond*, 9 Exch. 154.

(*q*) *Jackson v. Hudson*, 2 Camp. 447; 11 R. R. 762; Code, ss. 6 and 56. And see *In re Barnard*, 32 Ch. D. 447.

(*r*) *Jackson v. Hudson*, 2 Camp. 447; 11 R. R. 762; Beaw. 42; on Art. 159 of the French Code (which resembles s. 68 (2) of

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incomplete.

A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete; and, as we have already seen, the signature of a drawer, maker, or indorser, on blank stamped paper, delivered to be filled up as a negotiable instrument, will bind them respectively; so an acceptance, written on the paper before the bill is made, and delivered by the acceptor, will also charge the acceptor to the extent warranted by the stamp (*s*). It is not even necessary that the bill should be drawn by the same person to whom the acceptor handed the blank acceptance (*t*). And where a blank acceptance was filled up after the lapse of twelve years, and, as the jury found, after the lapse of a reasonable time, the acceptor was held liable to a *bonâ fide* indorsee (*u*). But it is conceived that the case of a blank

ours). Nougier remarks "si l'acceptation n'est pas le paiement, elle est l'engagement de payer," and in case of competition he apparently thinks preference as in payment for honour should be given according to the priority of the party for whose honour acceptance is offered, *i.e.*, to party offering to accept for honour of drawer, before one for honour of payee, of payee, or first indorser before second, and soon. *Lettres de Change* (edition 1839) Vol. I., p. 268.

(*s*) Code, s. 20. Though the bill bore a previous date against the then existing law. *Armfield v. Allport*, 27 L. J., Ex. 42. No liability attaches before delivery, *Baxendale v. Bennett*, L. R., 3 Q. B. D. 525; nor until completion. *In re Hayward*, L. R., 6 Chan. Ap. 546; 40 L. J. 49. Whether this first delivery or issue will be presumed in favour of a holder in due course under sect. 21 remains to be seen. Sect. 20, it will be noticed, presupposes some authority given by the deliverer, and makes the due following of that authority immaterial in case of a holder in due course; but if there has been no delivery at all, there will also be no authority at all. The decision of the learned judges in *Baxendale v. Bennett* distinctly proceeded on the assumption that there was no negligence, as other-

wise there would have been an estoppel. See judgment of Brett, L. J. Hence, perhaps, the true test will still be that of negligence or not; for if there be negligence, then the principle will apply, that where one of two innocent parties must bear a loss, he whose negligence or default rendered the fraud possible must suffer. A first delivery is not necessarily an "issue," Code, s. 2; *Revelstoke & Co. v. Commissioners Inland Revenue*, [1898] Ap. Ca. 565; 67 L. J. 855.

(*t*) *Schultz v. Astley*, 2 Bing. N. C. 544; 2 Scott, 815; 1 Hodges, 525; 7 C. & P. 99. But must be drawn *bonâ fide*. *Hogarth v. Latham*, L. R., 3 Q. B. D. 643. The acceptor is estopped as against an innocent indorsee for value from denying the regularity of the acceptance; and, as was held in *L. & S. W. Bank v. Wentworth*, L. R., 5 Ex. D. 96, that of the drawing and indorsement; but as to the indorsement, see Code, s. 54; and *Robinson v. Yarrow*, 7 Taunt. 455; 18 R. R. 537. In America it is held, that if the blank paper come into the hands of a holder without notice, he may fill up the blank with a larger sum than the original holder was authorized to insert. See Byles on Bills, 6th American edition, p. 292.

(*u*) *Montague v. Perkins*, 22 L. J., C. P. 188.

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Not before
the bill is in
existence.

acceptance not delivered at all, but lost or stolen, at least without any negligence of the writer, is distinguishable (*x*).

An acceptance for value, before the bill is filled up, is irrevocable. Notice that the acceptance was in blank should put the holder on inquiry (*y*).

It was formerly held (in cases where an acceptance in writing on the bill was not necessary), that a promise to accept, given *before the bill was made*, amounted to an acceptance. Thus, a promise by the defendants, that they would accept such bills as the plaintiff should, in about a month's time, draw on the defendant for 800*l.*, has been held an acceptance of such bill subsequently drawn (*z*). But it was said that a subsequent holder could not avail himself of such an engagement, unless it was communicated to him at the time he took the bill. "A promise to accept," says Gibbs, C.J., "not communicated to the person who takes the bill, does not amount to an acceptance; but, if the person be thereby induced to take a bill, he gains a right equivalent to an actual acceptance, against the party who has given the promise to accept" (*a*). But it is now settled that there cannot be an oral acceptance of a non-existing bill, although the bill be discounted by the drawer on the faith of a promise to accept (*b*). It has been decided, since 1 & 2 Geo. 4, c. 78, that an acceptance may be written before the bill is drawn, though that statute

(*x*) *Barendale v. Bennett*, 3 Q. B. D. 525. See, however, the observations of the Court in *Montague v. Perkins*, 22 L. J., C. P. 189; and *Ingham v. Primrose*, 28 L. J., C. P. 295; 7 C. B., N. S. 82. Perhaps the obligation created by blank makings, acceptances and indorsements of bills, cheques or notes depends on the principle of estoppel, and not on any peculiarity of negotiable paper. On this ground it is put by Lord Mansfield in *Russell v. Langstaffe*, 2 Doug. 514; and by Lord Chief Justice Tindal in *Schultz v. Astley*, *supra*; but see the observations of Williams, J., in *Ex parte Swan*, 7 C. B., N. S. 447, and Martin, B., and Channell, B., in *Swan v. North British Australian Company*, 31 L. J., Exch. 435. On the question whether the principle of estoppel can be applied to a *deed* improperly

filled up, the Courts of Common Pleas and of Exchequer were equally divided. *Ibid.* In the Exchequer Chamber it was held that it could not. 32 L. J., Exch. 273.

(*y*) *Hatch v. Searles*, 2 Sm. & G. 147; 24 L. J., Ch. 22; *Hogarth v. Latham*, 3 Q. B. D. 643.

(*z*) *Pillans v. Van Mirop*, 3 Burr. 1663; *Pierson v. Dunlop*, Cowp. 571; *Mason v. Hunt*, Doug. 284, 287.

(*a*) *Milne v. Prest*, 4 Camp. 393; Holt, N. P. 181, evidently an inaccurate report in Holt; see 11 M. & W. 390; *Johnson v. Collings*, 1 East, 98.

(*b*) *Johnson v. Collings*, 1 East, 98; *Bank of Ireland v. Archer*, 11 M. & W. 383. This is otherwise in some of the United States.

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makes it essential to the acceptance of an inland bill, that it should be in writing *on such bill*; and it would be no variance, though the declaration stated the drawing to have been first and the acceptance afterwards (c).

A bill may also be accepted when it is overdue, and the acceptor will then be liable to pay on demand; or after it has been dishonoured by a previous refusal to accept, or by non-payment (d). When a bill payable after sight is dishonoured by non-acceptance and subsequently accepted, the holder, unless otherwise agreed, is entitled to have the bill accepted as of the date of the first presentment (e).

After due or
after prior
refusal to
accept.

The date on a bill or note, or of the acceptance, making, or indorsement thereon, is *primâ facie* the true date; and where the acceptance is not dated, the presumption is that it was accepted before maturity, and within a reasonable time of its date (f).

Presumption
as to time of

The statute 3 & 4 Anne, c. 9, s. 5, expressly enacted that no acceptance of an *inland* bill should be sufficient to charge any person whatever, unless it were underwritten or indorsed on the bill. But this Act was so loosely drawn that two Chief Justices held a verbal acceptance to be binding notwithstanding, and that was finally settled to be law by Lord Hardwicke (g). This was much regretted, and accordingly the 1 & 2 Geo. 4, c. 78, s. 2, enacted that no acceptance of any *inland* bill of exchange should be sufficient unless in writing on the bill, or, if in parts, on one of the parts. This statute did not require the signature of the drawee, and excluded foreign bills. The 19 & 20 Vict. c. 97, s. 6, enacted that no acceptance of any bill, *inland* or *foreign*, should charge any person, unless in writing on the bill, and signed by the acceptor or on his behalf (h); and 41 Vict. c. 13, declared the signature alone of the drawee to be sufficient.

Must be in
writing on
bill.

(c) *Molloy v. Delres*, 7 Bing. 428; 5 M. & P. 275; 4 C. & P. 492. And the same interpretation was put on the 19 & 20 Vict. c. 97, which required the signature of the acceptor.

(d) Code, ss. 10 (2) and 18 (2); *Jackson v. Pigott*, 1 L. Ray. 364; *Muford v. Walcot*, *ibid.* 574; 1 Salk. 129; *Stein v. Iglesias*, 1 C., M. & R. 565; *Wynne v. Raikes*, 5 East, 514; *Christie v. Peart*, 7 M. & W. 491.

(e) Code, s. 18 (3); *Roberts v. Bethell*, 12 C. B. 778.

(f) Code, s. 13; *Roberts v. Bethell*, 12 C. B. 778.

(g) *Lumley v. Palmer*, 2 Stra. 1000.

(h) On this statute was decided the case of *Hindlaugh v. Blakey*, where the mere signature of the drawee was held insufficient as an acceptance, L. R., 3 C. P. D. 136.

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XVI.Signature
sufficient.

All the above Acts (or sections) are now repealed, and the Code, by s. 17, enacts that the acceptance must be in writing on the bill, but that the mere signature of the drawee suffices (i).

The usual mode of making such an acceptance on the bill was, even before the 19 & 20 Vict. c. 97, by writing the word "*accepted*," and subscribing the drawee's name. Signature was not essential to a written acceptance within the statute 1 & 2 Geo. 4, c. 78, but it was a question for the jury, whether the acceptance was complete. If the bill be payable after sight, the day when accepted should also be expressed. But the drawee's name alone, written on any part of the bill, was a sufficient acceptance; so, without any name, the word "*accepted*," "*presented*," "*seen*," the day of the month, or a direction to a third person to pay it (k). Where one banker held a cheque drawn on another banker, presented it after four o'clock, and it was not paid, but, according to the practice of the London bankers, a mark was put on it, to show the drawer had effects, and that it would be paid; this marking was held to amount to an acceptance payable next day at the clearing-house (l). It is not necessary, in pleading the acceptance of an inland bill, to aver that the acceptance was in writing, or signed (m).

What engagement the holder may require of the acceptor.

The holder is now entitled to require from the drawee an absolute engagement in writing, duly signed, to pay in money according to the tenor and effect of the bill, uncumbered with any condition or qualifications. A general acceptance, without any express words to restrain it, will be such an absolute acceptance.

(i) With delivery or notice in lieu thereof. Code, s. 21. A promise, written or oral, to pay or accept an existing foreign bill is at common law of itself an acceptance. *Clarke v. Cock*, 4 East, 57; *Wynne v. Raikes*, 5 East, 514; *Mendizabal v. Machado*, 6 C. & P. 218; *Nicholson v. Ricketts*, 29 L. J., Q. B. 55. And such a promise might have been given to the drawer or any other party to the bill, even if indorsed away or overdue. *Powell v. Monnier*, 1 Atk. 611; *Fairlee v. Herring*, 3 Bing. 625; *Grant v. Hunt*, 1 C. B. 44; and

was irrevocable. Mere detention of a bill might even amount to an acceptance. *Harvey v. Martin*, 1 Camp. 425; *Team v. Ward*, B. & Ald. 653. So, too, a letter written by the drawee to the drawer. *Billing v. Deraux*, 3 M. & G. 565; 11 L. T. 38.

(k) *Dufaur v. Oxenden*, 1 M. & R. 90; *Anon.*, Comb. 401; *Powell v. Monnier*, 1 Atk. 611; *Moor v. Withy*, B. N. P. 270.

(l) *Robson v. Bennett*, 2 Taunt. 388; 11 R. R. 614.

(m) *Chalie v. Belshaw*, 6 Bing. 529; 4 M. & P. 275.

CHAPTER
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qualified
acceptance.

If the drawee offer a qualified acceptance, the holder may either refuse or accept the offer. If he refuse to take a qualified acceptance he may, or rather must, treat the bill as dishonoured by non-acceptance, and give notice of dishonour, and protest the bill, if a foreign one. If he intend to acquiesce in it he should give notice of such qualified acceptance to the previous parties, and obtain their assent, for in case of a qualified acceptance, such of the prior parties as have not expressly or impliedly authorised or subsequently assented to his so doing will be discharged; but this dissent must be expressed within a reasonable time, or the party receiving such notice will be deemed to have assented. He may, however, safely take a partial acceptance on giving due notice. When a foreign bill has been accepted as to part, it must be protested as to the balance (n).

An acceptance that does not in express terms vary or qualify the drawer's order is a general acceptance.

Qualified
acceptances.

A qualified acceptance in express terms varies the effect of the bill as drawn.

There are five sorts of qualified acceptances (o).

- (a) Conditional — making payment by the acceptor dependent on the fulfilment of a stated condition :
- (b) Partial—promising to pay part only of the amount :
- (c) Local—promising to pay at a specified place only, and not elsewhere :
- (d) Qualified as to time—*e.g.*, promising to pay at a longer or shorter time :
- (e) Qualified as to parties—the acceptance of some, but not all, the drawees.

(n) Code, s. 44. *Sebag v. Abitbol*, 4 M. & S. 462 ; 1 Stark. 79. Taking an acceptance at a longer date destroyed the remedies against the prior parties according to both the Scotch and the old French law. See Glen, 2nd ed. 115 ; Poth. 49. The modern French law, Code de Commerce, Art. 124, avoids conditional acceptances, but permits partial acceptances, or those varying the place of payment. Art. 123. The acceptor will be liable according to the tenor of his acceptance. Code, s. 54. Noug. Let. de Change, vol. i. 234. And if the qualified acceptance be

refused he incurs no liability. *Sproat v. Matthews*, 1 T. R. 182 ; *Bentinck v. Dorrien*, 6 East, 200.

(o) Code, s. 19. But where a bill is *drawn* payable at a particular place (which is clearly within the drawer's power, Code, s. 51 (6), b), the acceptor, if he do not insert in his acceptance "there only and not elsewhere," will be held to have accepted generally in spite of those words. *Selby v. Eden*, 3 Bing. 611 ; *Fayle v. Bird*, 6 B. & C. 531 ; *Roach v. Johnston*, H. & J. 246.

CHAPTER
XVI.Conditional
acceptances.

Whether an acceptance be conditional or not, is a question of law (*p*). Acceptances, "to pay as remitted for" (*q*), "to pay when in cash for the cargo of the ship *Thetis*" (*r*), "to pay when goods consigned to him (the drawee) were sold" (*s*), an answer that a bill would not be accepted till a Navy bill was paid, have respectively been held to be conditional acceptances. So where, on the presentment of bills for acceptance, the drawee said he would have accepted them if he had had certain funds which he had not been able to obtain from France, but that when he did obtain them he would pay the bill, this was held to amount to a conditional acceptance (*t*). The words "accepted payable on giving up a bill of lading," constitute a conditional acceptance, but not a further condition to the acceptor's liability, that the bill of lading shall be given up on the day of maturity of the bill (*u*). When the acceptance is in writing, and absolute, it may be suspended on a condition by another contemporaneous writing (*x*).

But a mere oral condition (at least if contemporaneous with the acceptance) is inadmissible in evidence to qualify the absolute written engagement, even between the original parties. "This would be," says Lord Ellenborough, "incorporating with a written contract an incongruous parol condition, which is contrary to first principles" (*y*). And though the condition be written on a distinct paper, it cannot be available against an indorsee ignorant of the existence of such a paper (*z*).

(*p*) *Sproat v. Matthews*, 1 T. R. 182. A merely verbal alteration, that does not alter the legal effect of the bill, even though expressly intended so to do, is not a varying acceptance, *Decroix and another v. Meyer & Co.*, 25 Q. B. D. 343; 59 L. J. 538; affirmed [1891] Ap. Ca. 520. In this case the M. R. doubted if the list of qualified acceptances in Code, s. 19, were exhaustive, and seemed clearly to be of opinion that there could be such a thing as *restrictive acceptance* if properly worded, just as there are restrictive indorsements and drawings, ss. 8 and 35.

(*q*) *Banbury v. Lissett*, 2 Stra. 1211.

(*r*) *Julian v. Shobrooke*, 2 Wils. 9.

(*s*) *Smith v. Abbott*, 2 Stra. 1152.

(*t*) *Mendizabal v. Machado*, 6

C. & P. 218; 3 M. & Scott, 841.

(*u*) *Smith v. Vertue*, 30 L. J., C. P. 56; 9 C. B., N. S. 214.

(*x*) *Bowerbank v. Monteiro*, 4 Taunt. 844; 14 R. R. 679. But as between the immediate parties only, or those who rely on their title, or have notice. Code, s. 21 (2) b. *Spiller v. Westlake*, 2 B. & Ad. 157; 36 R. R. 520; *Gibbon v. Scott*, 2 Stark. 286; 19 R. R. 723.

(*y*) *Hoare v. Graham*, 3 Camp. 57; 13 R. R. 752; *Adams v. Wordley*, 1 M. & W. 374; 2 Gale, 29; *Besant v. Cross*, 10 C. B. 896. But a delivery may be shown to have been only conditional as between the immediate parties or remote, other than holders in due course. Code, s. 21 (2) b. And see ante, pp. 102 and 114 (n.).

(*z*) *Bowerbank v. Monteiro*, 4 Taunt. 844. See Chapter VII. ON IRREGULAR INSTRUMENTS.

Though, when the condition is performed, a conditional acceptance becomes absolute, yet, in pleading, it should be stated as a conditional acceptance, with an averment that the condition has been fulfilled (*a*).

An acceptance is partial that engages to pay part only of the sum for which the bill is drawn. Drawee accepted a foreign bill drawn for 127*l.*, "as far as 100*l.* part thereof," he was sued on the acceptance, and it was held good *pro tanto* within the custom of merchants (*b*).

An acceptance is qualified as to time that promises to pay at a different time from that at which the bill is drawn. A bill was accepted in this form, "accepted on the condition of its being *renewed* till 28th Nov. 1844." This was held to be an acceptance qualified as to time, on which the holder might insist against the acceptor, and that the word *renewed* might be read to mean an extension of the time when the bill was to become payable (*c*). An acceptance, which unnecessarily and inaccurately states the time of maturity, is not a varying acceptance (*d*).

An acceptance to pay at a particular place, will be a general acceptance unless it expressly state there only and not elsewhere (*e*).

(*a*) *Langston v. Corney*, 4 Camp. 176; 1 Marsh. 176; 1 D. & R., N. P. C. 33; *Ralli v. Sarrell*, 1 D. & R., N. P. C. 33; see a form, *Swann v. Cor*, 1 Marsh. 176.

(*b*) *Wegersloff v. Keene*, 1 Stra. 214.

(*c*) *Russell v. Phillips*, 19 L. J. 297; 14 Q. B. 891; *Walker v. Attwood*, 11 Mod. 190.

(*d*) *Fanshawe v. Peat*, 26 L. J., Ex. 314; 2 H. & N. 1.

(*e*) Code, ss. 19 (2) c, and 52 (1). And even then a presentment there too late to charge the drawer and indorsers will still, in the absence of an express stipulation to the contrary, render the acceptor liable. Code, s. 52 (2).

By the 1 & 2 Geo. 4, c. 78 (now repealed), it was enacted that an acceptance payable at a banker's, or other particular place, was, *as against the acceptor*, a general acceptance, unless the acceptor

expressed in his acceptance that the bill was to be payable there only, and not otherwise, or elsewhere. If he did so, due demand at that place was a condition precedent to his liability. On this statute it was decided that an acceptance omitting the word "only," but stating the bill to be payable at a particular place, and not elsewhere, was a qualified acceptance. *Siggers v. Nicholls*, 3 Jur. 34. If the customer of a banker accept a bill and make it payable at the bank, that is of itself a sufficient authority to the banker to apply the customer's funds in paying the bill. *Keymer v. Laurie*, 18 L. J., Q. B. 218. As to the liability of parties to a bill or note payable at a particular place, see ante, Chapter on PRESENTMENT FOR ACCEPTANCE, and post, Chapter on PRESENTMENT FOR PAYMENT.

CHAPTER
XVI.

Qualified as to parties.

Effect of two acceptances on the same bill.

Bill in a set.

Delivery or notice necessary to complete acceptance.

An acceptance is qualified when a bill drawn on two or more drawees, is accepted by one or some of them but not by all (*f*).

Although, as we have seen, there cannot be two acceptances on the same bill, except for honour (*g*), yet if such a second acceptance be on the bill, it may amount to a guarantee (*h*).

Where a bill is drawn in a set, each part being duly numbered and referring to the other parts, the whole constitutes but one bill. The acceptance may be written on any part, and must be written on one part only. For should the drawee accept more than one part, and such accepted parts get into the hands of different holders in due course, he may have to pay both (*i*).

The liability of the acceptor, though irrevocable when complete (*k*), does not attach by merely writing his name, but upon the subsequent delivery of the bill, or upon communication to, or according to the directions of, the person entitled to the bill that it has been so accepted. "La raison est," says Pothier, "que le concours de volontés, qui forme un contrat, est un concours de volontés que les parties se sont réciproquement déclarées ; sans cela, la volonté d'une partie ne peut acquérir de droit à l'autre partie, ni par conséquent être irrévocable. Suivant ces principes pour que le contrat entre le propriétaire de la lettre et celui sur qui elle est tirée soit parfait, il ne suffit pas que celui-ci ait eu pendant quelque temps la volonté d'accepter la lettre, et qu'il ait écrit au bas qu'il l'acceptait ; tant qu'il n'a pas déclaré cette volonté, le contrat n'est pas parfait ; il peut changer de volonté et rayer son acceptation" (*l*).

(*f*) If the drawees are partners in trade, one has *prima facie* a right to accept for all. If they are not partners, presentment must be made to all, unless one has authority to accept for all. Code, s. 41 b.

(*g*) As to which see ACCEPTANCE SUPRA PROTEST.

(*h*) *Jackson v. Hudson*, 2 Camp. 447 ; 11 R. R. 762 ; now, probably, it would be held to be an indorsement. *Steele v. M'Kinlay*, L. R., 5 Ap. Ca. 754 ; Code, s. 56. And *Singer v. Elliot*, 4 T. L. R. 524 ; *Maunder v. Erans*, 5 T. L. R. 75 ; and *Jenkins v. Cumber*, [1898] 2 Q. B. 168 ; 67

L. J. 780.

(*i*) *Holdsworth v. Hunter*, 10 B. & C. 451 ; 34 R. R. 479 ; *Pereira v. Jopp*, *ibid.* ; Code, s. 71.

(*k*) *Thornton v. Dick*, 4 Esp. 270 ; *Trimmer v. Oddie*, Bayley, 6th ed. 204.

(*l*) Poth. Edition, 1848, vol. iv. 489. *Cox v. Troy*, 5 B. & Ald. 474 ; 1 D. & R. 38 ; 24 R. R. 460 ; see *Bentinck v. Dorrien*, 6 East, 199 ; 2 Smith, 337 ; *Marius*, 20 ; and see *Ralli v. Denistoun*, 6 Exch. 483 ; *Chapman v. Cottrell*, 34 L. J., Ex. 186 ; *Van Dieman's Bank v. Victoria Bank*, L. R., 3 Pr. C. 526 ; 40 L. J., Pr. C. 28 ; Code, s. 21.

CHAPTER
XVI.Liability of
acceptor.

The acceptor is now considered in all cases as the party primarily liable on the bill. He is to be treated as the principal debtor to the holder, and the other parties as sureties liable on his default (*m*). The acceptor of a bill stands for most purposes in the same situation as the maker of a note, and therefore most of the following observations will apply to the latter also.

How dis-
charged.

The acceptor's liability, once complete, can only be discharged by payment, or other satisfaction, cancellation or alteration, waiver (or release, which is merely a more formal waiver), or transfer to him in his own right (*n*).

Payment, satisfaction, and release we shall consider hereafter.

The acceptor is at liberty to cancel his acceptance at any time before delivery, or notice of the acceptance to the holder (*o*), or person entitled to the bill.

Cancellation.

A bill is discharged when it has been intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon. And so any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent; but in such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged (*p*).

(*m*) *Fentum v. Pocock*, 5 Taunt. 192; 1 Marsh. 14.

(*n*) Transfer to him in his own right at or after maturity is a discharge of the bill, Code, s. 61; but if the converse hold good by implication, not so if the transfer be to him in someone else's right, as, for example, as trustee or executor; which has long been the rule in equity. A bill transferred to the acceptor before due is said to be "retired," and can in general be re-issued.

(*o*) *Cox v. Troy*, 5 B. & Ald. 474; 24 R. R. 460; *Bentinck v. Dorrien*, 6 East, 199; *Marius*, 20; *Ralli v. Denistoun*, 6 Ex. 483; *Chapman v. Cottrell*, 34 L. J., Ex. 186; *Van Dieman's Land Bank v. Victoria Bank*, L. R., 3 Pr. C. 526; 40 L. J., Pr. C. 28; Code, s. 21.

(*p*) Code, s. 63. In general, subsequent parties, from whom payment is enforced when the bill is dishonoured, have a right

of recourse against prior parties; hence in general cancellation of the acceptance frees the drawer and all indorsers; cancellation of the drawer's signature, all the indorsers; and cancellation of an indorser's signature, all subsequent indorsers; cancellation of the acceptance is therefore virtually a cancellation of the bill; hence, perhaps, the drawer is not mentioned as discharged in subsect. (2), but only the indorsers. But in a bill accepted for the accommodation of the drawer, *quære* if he would be discharged by cancellation of the acceptor's signature, though the indorsers would be; and if the bill were accepted for the accommodation of the payee, cancellation of the drawer's signature would not free the payee, the first indorser, for he would have no right of recourse against the drawer.

CHAPTER
XVI.Cancellation
by mistake.

A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative ; but when a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party alleging the same to have been done unintentionally, or under a mistake, or without authority (*q*).

Where an acceptance has been cancelled by mistake, it is the usage in the City of London to return the bill with the words "cancelled by mistake" written on it.

The proper and safe mode of cancelling is to draw the pen through the name, so as to leave it legible (*r*).

If a banker with whom a bill is made payable by the acceptor, cancel the acceptance by mistake, without any want of due care, and return the bill defaced, refusing to pay it, he does not thereby necessarily incur any legal liability ; but if in so doing he be guilty of want of due care, an action may lie against him at the suit of the holder, for the special damage sustained by the cancellation of the bill (*s*).

By waiver.

It is a general rule of law, that a simple contract may, *before breach*, be waived or discharged, without a deed and without consideration ; but after breach there can be no discharge, except by deed, or upon sufficient consideration (*t*). To this rule it has been repeatedly held that contracts on bills of exchange form an exception, and that the liability of the acceptor or other party, remote or immediate, though complete, may be discharged by an express renunciation of his claim on the part of the holder (*u*), without consideration.

(*q*) Code, s. 63 (3) ; *Warwick v. Rogers*, 5 M. & G. 340 ; *Haper v. Birkbeck*, 15 East, 17 ; 13 R. R. 354 ; *Davidson v. Cooper*, 11 M. & W. 778 ; *Sweeting v. Halse*, 9 B. & C. 365 ; 4 M. & R. 287 ; *Dominion Bank v. Anderson*, 15 C. o. S. 408. S. C. Cancellation, though it destroys rights on the bill as payment does, need not affect other rights in the same way. *Iglesias v. Mercantile Plate Bank*, L. R., 3 C. P. D. 60, 330.

(*r*) *Wilkinson v. Johnson*, 3 B. & C. 428 ; 27 R. R. 393 ; *Ingham v. Primrose*, 28 L. J., C. P. 294 ; 7 C. B., N. S. 82.

(*s*) *Novelli v. Rossi*, 2 B. & Ad. 757 ; 36 R. R. 736 ; *Warwick v. Rogers*, 5 M. & G. 340.

(*t*) Com. Dig. Action on the Case in Assumpsit, G. ; *Fitch v. Sutton*, 5 East, 230 ; *Dobson v.*

Espie, 26 L. J., Ex. 241 ; 2 H. & N. 79.

(*u*) The law seems now to be so settled in accordance with prior decisions, and with the law of France and other countries, where the distinction between simple contracts and contracts under seal is unknown. " Le créancier peut renoncer à son droit d'exiger le paiement de ce que lui doit son débiteur ; c'est ce qu'on appelle faire remise." Pardessus, Droit Commercial, vol. 1, p. 272, 6th ed. Paris. See the judgment of Parke, B., in *Foster v. Dawber*, 6 Exch. 851 ; see also Nouguiet des Lettres de Change, vol. 1, p. 353. See also *Dobson v. Espie*, 26 L. J., Ex. 240 ; 2 H. & N. 79 ; and Story on Bills, s. 266. The Code seems to require no consideration for either cancellation or waiver.

This exception seems at first sight to violate a fundamental rule, but the reason may be that the distinction between a release under seal and a release not under seal is quite unknown in most foreign countries. An express and complete renunciation by the holder of his claim on any party to the bill is therefore according to the law merchant equivalent to a release under seal. And as it would be highly inconvenient to introduce nice distinctions and nice questions of international law, all the contracts on a foreign bill, though negotiated or made in England, and all the contracts on an inland bill, depending as they do on the same law merchant, may be so released. And such a relaxation of the general rule in the case of bills of exchange is not unreasonable on another ground. The money due at the maturity of a bill of exchange is in practice expected to be paid immediately and in many cases with remedies over in favour of the debtor. Parties liable, who are expressly told that recourse will not, in any event, be had to them, are almost sure, in consequence, to alter their conduct and position. Joint indorsees against acceptors:—It was proved that the plaintiffs knew the acceptance was for the accommodation of the drawer, and that they had said, at a meeting of the defendants' creditors, "that they looked to the drawer, and should not come upon the acceptors." They had at this time goods of the drawer in their hands, which afterwards turned out of little value. Lord Ellenborough directed the jury to consider, "whether the language employed by the plaintiffs amounted to an absolute unconditional renunciation by them, as holders of the bill, of all claims in respect of it upon the defendants, as acceptors. In that case the acceptors were discharged from their liability: the holders had made their election, and could now only proceed against the drawer. On the other hand, if the words only imported that they looked to the drawer in the first instance, that it was not then necessary to come upon the acceptors, and that they should not resort to them if satisfaction could be obtained in another quarter, they did not waive their remedy by this conditional promise, and the acceptors still continued liable until the bill should be actually paid" (x). Receiving interest from the drawer will not discharge the acceptor. Nothing short of an express discharge will do so (y).

(x) *Whatley v. Tricker*, Camp. 35; 10 R. R. 623.

(y) *Dingwall v. Dunster*, Doug. 235; and *Black v. Peel*, and *Walpole v. Pulteney*, there cited;

Anderson v. Cleveland, 13 East, 430 n.; *Farquhar v. Southey*, M. & M. 14; 2 C. & P. 497; 31 R. R. 689; *Adams v. Gregg*, 2 Stark. 531; *Sterens v. Thacker*, Peake, 187.

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The renunciation must be absolute and unconditional ; and in writing, unless the bill be delivered up to the acceptor (z).

The bill itself is discharged when the holder at or after maturity renounces his rights against the acceptor.

And so the liabilities of any party to the bill may be renounced by the holder before, at, or after maturity ; but the rights of a holder in due course without notice of the renunciation will not be affected thereby (a).

A plea of waiver must state that the party waiving was the holder of the bill at the time of the waiver (b).

Security by
specialty.

The liability of the acceptor, as such, will also be extinguished, by taking from him a co-extensive security by specialty. But if the new security recognise the bill or note as still existing, it is not extinguished (c). Where one of three partners, after a dissolution of partnership, undertook, by deed made between the partners, to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly preserving his right against all three, and retained possession of the original bills, it was held that, the separate notes having proved unproductive, he might still resort to his remedy against the other partners, and that the taking, under these circumstances, the separate notes and even

So it has been held, that a right to sue the drawer may be waived. *Delatorre v. Barclay*, 1 Stark. 7 ; see *Cartwright v. Williams*, 2 Stark. 340 ; *Adams v. Gregg*, 2 Stark. 531 ; see Story on Bills, s. 252 ; see also *Steele v. Harmer*, 15 L. J., Exch. 217 ; 14 M. & W. 831 ; and 4 Exch. 1, in error. As to pleading a waiver, see *Steele v. Benham*, 3 D. & L. 506.

(z) Or his legal representatives. Delivery to a devisee was held insufficient in *Edwards v. Walters*, [1896] 2 Ch. 157 ; and in *In re, George*, 44 Ch. D. 627, a written direction to destroy. Code, s. 62.

(a) Code, s. 62. No consideration is required for a waiver. *Foster v. Dawber*, 6 Ex. 851. The construction of a written renunciation, like that of other written documents, is for the Court. See *In re George*, supra ; where

one was held revocable and therefore bad. If there be a partial or conditional renunciation, it should seem that it may be available between the actual parties if founded on good consideration. *Parker v. Leigh*, 2 Stark. 228 ; *Farquhar v. Southey*, 2 C. & P. 497 ; 31 R. R. 689 ; *Owen v. Pizey*, 11 W. R. C. P. 21. It is to be observed that the words in sub-sect. (2) are "in like manner," thus leading to a possible inference that a writing may now be required in renouncing another party's liability, though the other alternative—delivery—would be inapplicable.

(b) *Steele v. Harmer*, 15 L. J., Ex. 217 ; 14 M. & W. 136 ; 4 Ex. 1.

(c) *Ansell v. Baker*, 15 Q. B. 20 ; *Twopenny v. Young*, 3 B. & C. 208 ; 5 D. & R. 259.

afterwards renewing them several times successively, did not amount to satisfaction of the joint debt (*d*). But, in general, the taking a separate bill of one of two joint acceptors of a former bill is a relinquishment of all claim on the former security (*e*).

The acceptor of a bill engages absolutely to pay according to the tenor of his acceptance; he is also precluded from denying to a holder in due course ;

Contract of
the acceptor.

the existence of the drawer :

the genuineness of his signature :

his capacity and authority to draw the bill :

In the case of a bill payable to the drawer's order ;

the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement :

In the case of a bill payable to the order of a third person ;

the existence of the payee :

his then capacity to indorse, but not the genuineness or validity of his indorsement.

Hence the acceptor cannot be admitted to prove that the drawer's signature was forged (*f*) ; or to say that the payee being a bankrupt could not indorse (*g*), or even to say that a second bankruptcy before the acceptance precluded him from indorsing, though the effect of such second bankruptcy were to vest, *ipso facto*, all the bankrupt's property in his assignees (*h*). Neither can the acceptor be allowed to defeat the indorsement by setting up the infancy of the payee (*i*). Nor can the acceptor plead that the drawer to whose order the bill was made payable was a corporation, having no authority to indorse (*k*) ; nor that the drawer was a married woman, although as the husband might sue

(*d*) *Bedford v. Deakin*, 2 B. & Ald. 210 ; 2 Stark. 178.

(*e*) *Evans v. Drummond*, 4 Esp. 89 ; *Reed v. White*, 5 Esp. 122 ; *Thompson v. Percival*, 5 B. & Ad. 925 ; 3 N. & M. 667.

(*f*) Code, s. 54 ; *Price v. Neal*, 3 Burr. 1354 ; 1 W. Bl. 390 ; *Porthouse v. Parker*, 1 Camp. 82 ; 10 R. R. 637 ; *Prince v. Brunatte*, 1 Bing. N. C. 435 ; 1 Scott, 342 ; 3 Dowl. 382 ; *Wilkinson v. Lutwidge*, 1 Stra. 648 ; *Jenys v. Fowler*, 2 Stra. 946, and see *Bass v. Clive*, 4 M. & Sel. 13 ; 4 Camp. 78 ; *Phillips v. Im Thurn*, L. R., 1 C. P. 463 ; 35 L. J. 220 ; *Garland v. Jacomb*,

L. R. 8 Ex. 216. In *L. & S. W. Bank v. Wentworth*, L. R., 5 Ex. D. 96, it was held that he admitted the drawer's indorsement as well, but this decision was anterior to the passing of the Code.

(*g*) *Drayton v. Dale*, 2 B. & C. 293 ; 3 D. & Ry. 534 ; 26 R. R. 356 ; *Braithwaite v. Gardiner*, 8 Q. B. 473.

(*h*) *Pitt v. Chappelow*, 8 M. & W. 616.

(*i*) *Taylor v. Croker*, 4 Esp. 187 ; *Jones v. Darch*, 4 Price, 300 ; 18 R. R. 720. Code, s. 22.

(*k*) *Halifax v. Lyle*, 19 L. J., Exch. 197 ; 3 Exch. 446. Code, s. 22.

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or indorse, the consequence might be that the acceptor might possibly be compelled to pay the bill twice (*l*). Nor that the drawing (and first indorsing) were in the name of a deceased person (*m*). But the acceptance of a bill drawn and indorsed in the name of a really existing person is no admission of the handwriting of the *indorser* (*n*), unless at the time of the acceptance the drawee knew of the forgery, and intended that the bill should be put into circulation by a forged indorsement (*o*). And the acceptance of a bill purporting to be already indorsed by the payee, not being the drawer, is no admission of the genuineness or validity of the indorsement (*p*); and the law is the same though the bill be payable to the drawer's own order (*q*). So where the drawing is by procuration, the authority of the agent to draw is admitted, but not his authority to indorse (*r*). But where the bill is drawn in a *fictitious name*, the acceptor undertakes to pay to an indorsement by the same hand (*s*). A plea to the jurisdiction only of an inferior court, though admitting the allegations of acceptance, notice of dishonour, &c., does not admit that they took place within the jurisdiction (*t*).

Where drawee
precluded
from disput-
ing accept-
ance.

A forgery is incapable of ratification (*u*), but if the drawee has once admitted that the acceptance is in his own handwriting, and thereby given currency to the bill, he cannot afterwards exonerate himself by showing that it was forged (*x*).

(*l*) *Smith v. Marsack*, 18 L. J., C. P. 68; 6 C. B. 486. As to married women now, see ante, p. 78.

(*m*) *Ashpittle v. Bryan*, 32 L. J., Q. B. 91; 3 Best & S. 474; affirmed in error, 33 L. J., Q. B. 328.

(*n*) *Smith v. Chester*, 1 T. R. 655; 1 R. R. 345; *Carrick v. Vickery*, Doug. 2nd ed. 653, n. 134.

(*o*) *Beeman v. Duck*, 11 M. & W. 251.

(*p*) *Tucker v. Robarts*, 18 L. J., Q. B. 169; 22 L. J., Q. B. 270; in error, 16 Q. B. 560.

(*q*) Story on Bills, p. 489; but see a dictum of Patteson, J., in *Tucker v. Robarts*, supra; *Beeman v. Duck*, supra; *Garland v. Jacomb*, L. R., 8 Ex. 216.

(*r*) *Robinson v. Yarrow*, 7 Taunt. 455; 18 R. R. 537; 1 Moore, 150; see ante, p. 41.

(*s*) *Cooper v. Mayer*, 10 B. & C. 468; 5 M. & R. 387; 34 R. R. 493;

Beeman v. Duck, 11 M. & W. 251; and see *Taylor v. Croker*, 4 Esp. 187; *Bass v. Clire*, 4 M. & S. 13; 4 Camp. 78. See *Phillips v. Im Thurn*, 35 L. J., C. P. 220; L. R., 1 C. P. 463. It seems that a bill drawn and indorsed in a fictitious or forged name, to the knowledge of the drawer, should be declared on as payable to the bearer. See *Phillips v. Im Thurn*, ante, and *Beeman v. Duck*, 11 M. & W. 251. Code, s. 7 (3).

(*t*) *Sewell v. Cheetham*, L. R., 9 C. P. 420.

(*u*) *Brook v. Hook*, L. R., 6 Exch. 89; 40 L. J. 50.

(*x*) *Leach v. Buchanan*, 4 Esp. 226; so held by Lord Ellenborough. Mere silence after knowledge does not create an estoppel. *McKenzie v. British Linen Co.*, L. R., 6 Ap. Ca. 82; *Ogilvie v. West Australian Bank*, [1896] Ap. Ca. 257.

By paying one forged acceptance a man is not estopped from setting up that defence in the case of another similar bill (*y*).

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Forged
acceptance.
Obligation to
accept.

When goods or bills of lading are sent to the consignee accompanied by a bill of exchange for his acceptance, he must accept the bill before he can acquire or transfer any property in the goods or bills of lading (*z*). So when a cheque was sent in respect of a promised renewal, the acceptor cannot take the cheque without renewing the acceptance (*a*).

In alluding to excuses for notice of dishonour, the Code in sect. 50 (2) c. (4) uses the phrase—when the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay; and in excuses for due presentment for payment in sect. 46 (2) c, the phrase—where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay, and the drawer has no reason to believe that the bill would be paid if presented; both these probably cover much the same ground as the expression formerly used, that the drawer was not entitled to expect due presentment or notice of dishonour where he had neither any effects in the drawee's hands at the time, nor a reasonable probability of there being such. An obligation to accept or pay can only arise from a contract express or implied, as has been noticed in the case of a banker's obligation to honour his customer's cheque; but still, whenever the drawer has, as Lord Ellenborough says, "a solid belief" that the bill will be duly accepted or paid, whether from the state of accounts or any other relation between himself and the drawee, he will probably be entitled to expect both (*b*).

When acceptance is refused, and the bill is protested for non-acceptance, or where a bill has been protested for better security and is not overdue, any person not being liable thereon may, with the consent of the holder, intervene and accept the bill *supra protest*, for the honour of any party thereto, or for the honour of the person for whose account the bill is drawn.

ACCEPTANCE
SUPRA PRO-
TEST OR FOR
HONOUR.

There may be a partial acceptance for honour.

(*y*) *Morris v. Bethell*, L. R., 5 C. P. 47.

C. A., March 8th, 1899.

(*z*) *Shepherd v. Harrison*, L. R., 5 H. L. 116; 40 L. J., Q. B. 149; Sale of Goods Act, [1893] s. 19 (3); but see *Cahn's case*,

(*a*) *Torrance v. Bank of British North America*, L. R., 5 P. C. 246.

(*b*) *Rucker v. Hiller*, 3 Camp. 217; 14 R. R. 278.

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XVI.

If the acceptance does not state for whose honour it is made, it will be deemed to be for the honour of the drawer (*c*).

Referee in
case of need.

Though, as we have seen, there cannot be two or more drawees in the alternative, or in succession, yet the drawer or indorser may insert in the bill the name of a person to whom the holder may resort if the bill is dishonoured by non-acceptance or non-payment. Such person is called the "referee in case of need," and resort to him is optional on the part of the holder (*d*).

Contract of
acceptor
supra protest.

An acceptance *supra protest* must be written and signed on the bill, and indicate that it is an acceptance for honour (*e*).

An acceptance for honour is liable on the bill to the holder, and to all parties to the bill subsequent to the one for whose honour he has accepted. He engages that he will, on due presentment, pay the bill according to the tenor of his acceptance on the drawee's default, provided it be duly presented to the drawee and protested for non-payment, and that he receive notice of these facts (*f*).

Protest for non-payment is required before the bill can be presented either to the acceptor for honour, or the referee in case of need ; and also, again, in case of dishonour by the acceptor for honour (*g*).

(*c*) Code, s. 65 (1). Protest has always been necessary whereon to found an acceptance for honour. *Vandewall v. Tyrrell*, M. & M. 87 ; *Geralopulo v. Wieler*, 10 C. B. 690 ; Bay. 6th ed. 181 ; Nougier, *Lettres de Change*, 584—591. As to protesting for better security, see Chapter on PROTEST AND NOTING.

(*d*) Code, ss. 6 (2) and 15. Protest for non-acceptance is not mentioned as being required when the holder has recourse to a referee in case of need, but protest for non-payment is. Sect. 67 (1). A referee in case of need seeming to be more an agent to pay the bill than an alternative drawee. A referee in need appointed by an indorser, is not a party to receive notice of dishonour and so gain extra time. *In re Leeds Banking Co.*, L. R., 1 Eq. 76 ; 35 L. J., Ch. 33.

(*e*) Sect. 65 (3). The full form should be "accepted *supra protest* for the honour of A.," B' : but more commonly "accepts S. P.," B' : Beawes, 38.

(*f*) Sect. 66. An acceptor, S. P., admits the genuineness of the signature of the party for whose honour he accepts, and is bound by any estoppel binding on such party. *Phillips v. Im Thurn*, L. R., 1 C. P. 463. He is placed in the shoes of such party, both as regards his liability to subsequent parties and his rights against the antecedent parties, and in addition can recover against such party himself. Beawes, 47. Code de Commerce, Art. 159. Poth. Vol. IV., Pt. I. 113, 114. Nougier, L. D. C. 584—591. And so in Code of any one who pays for honour, s. 68 (5).

(*g*) Code, s. 67.

CHAPTER
XVI.Presentment
to acceptor
for honour.

Where the acceptor for honour lives where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; if elsewhere, then forwarded to him within the same time; but failure or delay in so presenting will be excused by any circumstance which would excuse failure or delay of presentment for payment (*h*). The maturity of a bill accepted for honour is now calculated from the date of noting and protesting for dishonour, and not from the date of acceptance for honour (*i*).

Mode of such
acceptance.

The method of accepting *supra protest* is said to be as follows, viz. the acceptor *supra protest* must personally appear before a notary public, with witnesses, and declare that he accepts such protested bill in honour of the drawer or indorser, as the case may be, and that he will satisfy the same at the appointed time; and then he must subscribe the bill with his own hand (*k*).

Who may so
accept.

Any person not already liable on it may accept a bill *supra protest*: and the drawee himself, though he may refuse to accept the bill generally, may yet accept it *supra protest* for the honour of the drawer or of an indorser (*l*). And though we have seen that, after one general acceptance, there cannot be another acceptance (*m*), yet, when a bill has been accepted, *supra protest*, for the honour of one party, it is said that it may, by another individual, be accepted, *supra protest*, for the honour of another (*n*). In no one case is the holder obliged to take an acceptance for honour (*o*).

Conduct
which holder
should pursue.

The holder of a dishonoured bill, who is offered an acceptance for the honour of some one of the preceding parties to the bill, should first cause the bill to be protested,

(*h*) Code, ss. 67 (2) and (3), and 46. The 6 & 7 Will. 4, c. 58 (now repealed), contained the same provision as to time of presentment to acceptor *supra protest* or referee in case of need.

(*i*) Code, s. 65 (5). So formerly, *Williams v. Germaine*, 7 B. & C. 468; 1 M. & R. 394; 31 R. R. 248.

(*k*) The Code does not seem expressly to require the services of a notary for acceptance, S. P., but it certainly does for payment. S. P. Sect. 68 (3).

(*l*) Beawes, 33. And it has

been held in America that it is no objection that the acceptor *supra protest* takes the guarantee of the drawee. Byles on Bills, 6th American edition, 403.

(*m*) *Jackson v. Hudson*, 2 Camp. 447; 11 R. R. 762.

(*n*) Beawes, pl. 42. See ante, p. 258.

(*o*) *Mutford v. Walcott*, 12 Mod. 410; 1 Ld. Raym. 575, S. C.; Beawes, 37; *Gregory v. Walcup*, Comb. 76; *Pillans v. Van Mierop*, 3 Burr. 1663. Code, s. 65 (1).

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and then to be accepted, *supra protest*, in the manner above described. At maturity he should again present it to the drawee for payment, who may, in the meantime, have been put in funds by the drawer for that purpose. If payment by the drawee be refused, the bill should be protested a second time for non-payment (*p*), and then presented for payment to the acceptor for honour (*q*). Doubts having arisen as to the day when the bill should be again presented to the acceptor for honour, or referee in case of need, for payment, the 6 & 7 Will. 4, c. 58 (now repealed), enacted, that it should not be necessary to present, or in case the acceptor for honour or referee live at a distance, to forward for presentment, till the day following that on which the bill becomes due, and a similar provision is contained in the Code (*r*).

In a case which attracted much attention, it was proved, that where a foreign bill, drawn upon a merchant residing in Liverpool, payable in London, is refused acceptance, the usage is to protest it for non-payment in London. The bill is put into the hands of a notary, and he formerly used to make protest at the Royal Exchange, but that custom is obsolete: the notary now is merely desired by the holder to seek payment of the bill, and on a declaration by the holder that the drawee has not remitted any funds, or sent to say where the bills will be paid, the notary at once marks it as protested for non-payment. The Court (except perhaps, Bayley, J.) seemed to think this might, if the bill were payable in London, be, in ordinary cases, sufficient. But they were all agreed that it would not have been

(*p*) *Hoare v. Cazenove*, 16 East, 391; 14 R. R. 370.

(*q*) *Williams v. Germaine*, 7 B. & C. 477; 1 M. & R. 394; 31 R. R. 248.

(*r*) Code, s. 67. According to the French law the acceptor for honour is bound to give notice to the person for whose honour he accepts. "L'INTERVENANT EST TENU DE NOTIFIER SANS DELAI SON INTERVENTION A CELUI POUR QUI IL EST INTERVENU." Code de Commerce, 127:—"Parce que autrement," says Rogron, "le tireur, ignorant ce qui est arrivé, pourrait envoyer la provision au tiré; l'observation de cette disposition donne lieu à des dommages-intérêts contre l'accepteur par intervention si le

tireur en éprouve quelque préjudice." But according to Beawes, pl. 47, any one accepting a bill *supra protest*, for the honour of the drawers or indorsers, though without their order or knowledge, has his remedy against the person for whose honour he accepted. It seems that, by the former Scotch law, a holder might take an acceptance *supra protest*, and yet sue the drawer or indorsers. Thompson, 489. Such is certainly the French law: "*Le porteur de la lettre de change conserve tous ses droits contre le tireur et les endosseurs à raison du défaut d'acceptation par celui sur qui la lettre était tirée, nonobstant toutes acceptations par intervention.*" Code de Com. 128.

sufficient in the principal case to charge the acceptor, *supra protest*, because the acceptance was in these words—"If regularly protested and refused when due;" and they said the drawees could not be said to refuse, unless they were asked. The Court also appear to have been clear, that though there might be cases in which an exhibition of the bill to a notary in London is sufficient, yet that in all cases a bill *may* be sent to the drawee, and indeed that such is the more regular course (*s*).

By the 2 & 3 Will. 4, c. 98, it was enacted, that all bills made payable by the drawer elsewhere than at his residence, were to be protested where payable. This statute is repealed by the Code, which enacts as follows:—

A bill must be protested at the place where it is dishonoured; but when presented through the Post Office, and returned by post dishonoured, it may be protested at the place to which it is returned, and on the day of its return, if during business hours, otherwise on the morrow if a business day.

Where a bill drawn, payable at the place of business or residence of some other person than the drawee, has been dishonoured by non-acceptance, it must be protested where payable, and no further presentment for payment to, or demand on, the drawee is necessary (*t*).

The undertaking of the acceptor, *supra protest*, is not an absolute engagement to pay at all events, but only a collateral conditional engagement to pay, if the drawee do not. "It is," says Lord Ellenborough, "an undertaking to pay, if the original drawee, upon a presentment to him for payment, should persist in dishonouring the bill, and such dishonour by him be notified, by protest, to the person who has accepted for honour" (*u*). The learned Judge proceeds to lay down the doctrine that a second protest is necessary; observing: "The use and convenience, and, indeed, the

Liability of
acceptor
supra protest.

(*s*) *Mitchell v. Baring*, 10 B. & C. 4; M. & M. 581; 4 C. & P. 35; 34 R. R. 307.

(*t*) Code, s. 51 (6).

(*u*) *Hoare v. Cazenove*, 16 East, 391; 14 R. R. 370. See *Vandewall v. Tyrrell*, M. & M. 87. In America it is held that where a draft has been protested for non-acceptance, the holder is not bound to present it at maturity for payment. *Exeter Bank v. Gordon*, 8 New Hamp. 66. But this is not so when there has

been an acceptance *supra protest*. An acceptor for the honour of the drawer cannot recover against him without proof of presentment for acceptance or payment and refusal, and notice to the drawer. *Baring v. Clark*, 19 Pick. 220. He who accepts, *supra protest*, is not liable unless demand of payment is made on the drawer and notice of the refusal given. *Schofield v. Baynard*, 3 Wendell, 491. See Byles on Bills, 6th American ed. 404.

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necessity of a protest upon foreign bills of exchange, in order to prove, in many cases, the regularity of the proceedings thereupon, is too obvious to warrant us in dispensing with such an instrument in any case where the custom of merchants, as reported in the authorities of law, appears to have required it." And a second protest, for non-payment by the drawee, is after acceptance, *supra protest*, equally necessary, in order that either the holders may charge the acceptor, *supra protest*, or the acceptor, *supra protest*, may charge the party for whose honour the acceptance was given. The object of an acceptance for honour is to save to the holder all those rights which he would have enjoyed, had the bill been accepted in a regular manner. If the bill be drawn payable at a certain period after sight, and accepted *supra protest*, a second presentment for payment, and protest and notice, is still essential, for the purpose of enabling the holder to sue either drawer or acceptor *supra protest*, or enabling the latter to sue the party for whose honour he has accepted. And the time which the bill has to run was formerly computed, not from the date of the exhibition to the drawee, but from the date of the acceptance *supra protest* (x). Presentment to the drawee, and protest, must be averred in the pleadings (y). The acceptor, *supra protest*, becomes liable to all parties on the bill subsequent to him for whose honour the acceptance was made (z).

The acceptor, *supra protest*, admits the genuineness of the signature, and is bound by any estoppel binding on the party for whose honour he accepts. Thus, where a bill was drawn in favour of a non-existing person or order, but the name of the drawer and the name of the payee and first indorser were both forged and the defendant accepted for the honour of the drawer, it was held that the defendant was estopped from disputing the drawer's signature, and that the bill, though drawn in favour of a non-existing person, was negotiable, and payable to bearer (a).

Rights of
acceptor
supra protest.

By acceptance *supra protest*, the party for whose honour it was made, and all parties antecedent to him, become liable to the acceptor, *supra protest*, for all damages which he may incur by reason of his acceptance (b). The acceptor

(x) *Williams v. Germaine*, 7 B. & C. 468; 1 Man. & R. 394, 403; 31 R. R. 248 (but see now Code, s. 65 (5)).

(y) *Ibid.*

(z) *Hoare v. Cazenove*, 16 East, 391; 14 R. R. 370; Bayley,

6th ed. 178; Beawes, 33; Marius, 21; *Ex parte Wackerbath*, 5 Ves. 574; Code, s. 66 (2).

(a) *Phillips v. Im Thurn*, L. R., 1 C. P. 463.

(b) Beawes, 47; Code, s. 68 (5).

supra protest, where the bill has been protested for better security, has his remedy also against the acceptor (c). It was once held (d), that a party paying for the honour of the drawer had no claim on the assignees of the accommodation acceptor, because the drawer himself had none, but in a later case it was decided that he could recover against the acceptor whether the acceptance were given for value or not (e).

(c) *Ex parte Wackerbath*, 5 Ves. 574.

(d) *Ex parte Lambert*, 13 Ves. 179; 9 R. R. 169.

(e) *Ex parte Swan*, L. R., 6 Eq. 344. In America it is held that if a third party takes up a bill at its maturity for the honour of the drawer, and at his request,

he thereby releases the accommodation acceptor of such bill, whether he intended it or not. See Byles on Bills, 6th American ed. 404. A holder of a bill, for which value has at any time been given, can recover against the accommodation acceptor. Code, ss. 27 (2) and 28 (2).

An 'approved acceptance' in a mercantile context means an acceptance to which no reasonable objection can be taken, & it is not competent to prove that by the custom of the trade it means an acceptance to which no objection has in fact been made. *Mc Dowall & Neilson's Trustees v. Snowball Co.* 7 F. 35.

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OF PRESENTMENT FOR PAYMENT.

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SUBJECT to the other provisions of the Code, a bill or note must be duly presented for payment (a).

If it be not so presented, the drawer and indorsers shall be discharged (b) (except, as we have seen, the drawer of a cheque, who suffers no damage, Code, s. 74).

(a) Code, s. 45. The other provisions seem to be those in ss. 46, relating to excuse of presentment, delay, &c. ; 86 and 87, as to promissory notes.

(b) Code, s. 45. The acceptor

or maker still, in general, remaining liable, neither are protest or notice of dishonour required to charge him. Code, ss. 52 and 87 (1). Ante, p. 239.

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When the bill or note is payable on demand, then subject to the other provisions of the Code presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement in order to render the indorser liable. In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case ; it is therefore a mixed question of law and fact (*c*).

When to be made if payable on demand ;

When the bill or note is not payable on demand, presentment must be made on the day on which it falls due ; to be determined as follows (*d*).

if not on demand.

Three days of grace are in every case (unless otherwise provided in the bill or note) added to the time of payment, and the bill or note falls due on the last of these.

Three days of grace.

If the last day of grace fall on a Sunday, Christmas Day, Good Friday, or Public Fast, the bill is due and payable on the preceding business day.

Sundays.

When the last day of grace is a bank holiday (other than Christmas Day or Good Friday), or is a Sunday, and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day.

Bank holidays.

When a bill is payable at a fixed period, as say a certain number of days after date, after sight, or after the happening of a specified event, the period or those days are reckoned

Time, how computed.

(*c*) Sects. 10 and 45 (2) ; the other provisions seem to be those in ss. 46 and 86.

A note payable on demand is more leniently treated, as to when it is to be considered as overdue, than other instruments payable on demand, and consequently perhaps a more liberal interpretation will be given to reasonable time ; neglect to present bank notes has been held excused if they were circulated within a reasonable time, *Camidge v. Allenby*, 6 B. & C. 373 ; 30 R. R. 358 ; and bankers' cash notes, if they be returned within a reasonable time, *Rogers v. Langford*, 1 C. & M. 637 ; *Robson v. Oliver*, 10 Q. B. 704 ; and see Code, s. 36 (3).

(*d*) Code, s. 14. Bank holidays as regulated by 34 Vict. c. 17, and 38 Vict. c. 13, s. 2, are for England and Ireland : Easter Monday, Whit Monday, first Monday in August, 26th of December, if a week day (if not the 27th). And in Scotland : New Year's Day, Christmas Day (if either be Sunday, then Monday), Good Friday, the first Monday in May, and in August. By the French Code a bill that would otherwise fall due on a fête day, established by law, falls due on the preceding day. Code de Commerce, liv. i. tit. 8, art. 134. See, too, *Tassell v. Lewis*, 1 Lord Ray. 743.

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exclusively of the day from which the time is to run, and inclusively of the day on which it falls due, or rather would fall due but for the days of grace (*e*).

When a bill is payable at a fixed period after sight, the time begins to run from the date of acceptance, if it be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance or non-delivery (*e*).

The term month in a bill or note means calendar month (*f*).

When a bill drawn in one country is payable in another, the due date thereof is determined according to the law of the place where payable (*g*).

Usance.

Usance was the period which, in early times, it was usual to appoint between different countries for the payment of bills,—When usance is a month, half usance is always fifteen days (*h*), notwithstanding the unequal length of the months. It is now almost if not quite obsolete.

Old and new style.

It is said that all the countries with which the English are in the habit of negotiating bills, compute their time by the new style, with the single exception of Russia (*i*). In the case of bills drawn in a place using one style, and payable in a place using another, if drawn payable at a certain period after date, they fall due as they would have done in the country in which they were drawn. Thus, a bill drawn Feb. 1, in London, on St. Petersburg, at one month, would be payable, without the days of grace, on March 1, in our calendar; and, as it was drawn on Jan. 21, old style, it would fall due on Feb. 21, in the Russian calendar. But, if the bill were drawn payable at a day certain, or at a certain period after sight, the time must then be reckoned according to the style of the place on which it is drawn (*k*).

Days of grace. What in different countries.

Days of grace are so called, because they were formerly allowed the drawee as a favour: they were entirely abolished by the French Code (*l*), and by most, if not all, of the

(*e*) Code, s. 14 (2) and (3); *Campbell v. French*, 6 T. R. 200; 3 R. R. 154; *Coleman v. Sayer*, 1 Barnard. 303. After sight on a bill, means after acceptance; but on a note it means that the note must again be exhibited to the maker before he can be called on to pay. *Holmes v. Kerrison*, 2 Taunt. 323; 11 R. R. 594. As to undated bills,

see Code, s. 12; ante, p. 90.

(*f*) Code, s. 14 (4). So in Acts of Parliament passed since 1850, 13 & 14 Vict. c. 21, s. 4. *Migotti v. Coltrill*, L. R., 4 C. P. D. 233.

(*g*) Code, s. 72 (5).

(*h*) Marius, 93.

(*i*) Bayley, 201.

(*k*) Beawes, 444; Bayley, 202.

(*l*) "Tous délais de grâce, de

various European Codes since framed, more or less, on that model, and now, with the exception possibly of Russia (*m*), exist among the English-speaking races only.

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A presentment for payment before the last day of grace is premature, and will not enable the holder to charge the antecedent parties (*n*).

Presentment
before last
day of grace.

Days of grace are allowed on promissory notes as well as on bills (*o*). They are allowed, whether the bill or note be made payable on a certain event, or at a certain day (*p*), or at a certain number of years, months, weeks, or days, after date or after sight, or at usance, or by instalments (*q*). But they are not allowed on bills or notes payable on demand (*r*). Whether days of grace were at common law allowed on bills payable *at sight*, was undecided. The weight of authority had been considered to incline in favour of such an allowance (*s*); but now, since 34 & 35 Vict. c. 74, ss. 2, 4 (repealed), bills and notes drawn after August 14th, 1871, payable at sight or on presentation, are payable on demand, and therefore no days of grace are allowed, and Code, ss. 10 and 14 are to the same effect.

On what in-
struments
days of grace
allowed.

We have already seen that the time which bills payable *after sight* have to run is computed from the date of the acceptance (*t*); a note payable at a certain period after sight is payable at that period after presentment for sight (*u*). So, if some time after a refusal to accept, a bill payable after sight be accepted, *supra protest*, the time is calculated,

Of a bill pay-
able after
sight.

faveur, d'usage, ou d'habitude locale pour le paiement de lettres de change, sont abrogés." Code de Commerce, liv. i. tit. 8, art. 135.

(*m*) In which country a Code is said to be in preparation. The days of grace (if still existing) are at St. Petersburg ten days on bills after date, or overdue, and three days on those at sight.

(*n*) Code, s. 45 (1); *Wiffen v. Roberts*, 1 Esp. 261; 5 R. R. 737.

(*o*) *Brown v. Harraden*, 4 T. R. 148.

(*p*) Ibid., and so held in America. *Griffin v. Goff*, 12 Johns. Rep. 423.

(*q*) *Oridge v. Sherborne*, 11 M. & W. 374; *Carlton v. Kenealy*, 12 M. & M. 139. If the whole be payable on default of payment of

any one instalment the note is still a good promissory note, ss. 9 and 89; and see *Miller v. Biddle*, Exch., M. T. 1855; and *Monetary Advance Co. v. Cater*, 20 Q. B. D. 785; 57 L. J. 463. Are three more days of grace to be allowed?

(*r*) Bayley, 241; Code, s. 14.

(*s*) Beawes, 256; Kyd, 10; Bayley, 198; *Dehors v. Harriott*, 1 Show. 163; *Coleman v. Sayer*, Barn. K. B. 303; 2 Stra. 829; *Janson v. Thomas*, Bayley, 6th ed. 241; 3 Doug. 421; *Dixon v. Nuttall*, 1 C., M. & R. 307; 6 C. & P. 320; and see Selwyn, N. P. 7th ed. 344.

(*t*) *Campbell v. French*, 6 T. R. 200; 2 H. Bl. 163; 3 R. R. 154.

(*u*) *Sturdy v. Henderson*, 4 B. & Ald. 592.

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When presentment of bills payable on demand is to be made.

not from the date of the exhibition of the bill to the drawee, but from the date of the noting for non-acceptance (x).

Bills and notes payable on demand, and cheques, must be presented within a reasonable time. What is a reasonable time seems to be now a mixed question of law and fact (y), though formerly of law only. "Reasonable time," says Lord Coke, "shall be adjudged by the discretion of the justices before whom the cause dependeth; and so it is of reasonable fines, customs and services, upon the true state of the case depending before them; for reasonableness in these cases belongeth to the knowledge of the law; and therefore to be decided by the justices. *Quam longum esse debit non definitur in jure, sed pendet ex discretione iusticiariorum*. And, this being said of time, the like may be said of things incertaine, which ought to be reasonable; for nothing that is contrary to reason is consonant to law" (z). Besides, the opinions of jurors have been so various, that there can be no certainty on the subject, unless it be held to be a question of law. Yet we have seen, that what is a reasonable time within which to present for acceptance a bill drawn payable after sight has been held a question of fact for the jury, and the same point has been ruled as to the time of presentment for payment of a note payable on demand (a).

General rule.

A man taking a bill or note payable on demand, or a cheque, is not bound, laying aside all other business, to present or transmit it for payment the very first opportunity. It has long since been decided, in numerous cases, that, though the party by whom the bill or note is to be paid live in the same place, it is not necessary to present the instrument for payment till the morning next after the day on which it was received (b). And later cases have established, that the holder of a cheque has the whole of the

(x) *Williams v. Germaine*, 7 B. & C. 468; 1 M. & R. 394; 31 R. R. 248, formerly from date of acceptance for honour. But see now, Code, s. 65 (5).

(y) *Tindal v. Brown*, 1 T. R. 168; 1 R. R. 171; *Darbyshire v. Parker*, 6 East, 3; 2 Smith, 195; *Parker v. Gordon*, 7 East, 385; 3 Smith, 358; 8 R. R. 646; *Haynes v. Birks*, 3 Bos. & Pul. 599; *Appleton v. Sweetapple*, Bayley, 6th ed. 234; 3 Doug. 137; Code, s. 45 (2) and 74.

(z) Co. Litt. 56 b.

(a) *Manwaring v. Harrison*, 1 Stra. 508; *Hankey v. Trotman*, 1 W. Bl. 1; see ante, p. 212, as to Presentment for Acceptance.

(b) *Ward v. Evans*, 2 Ld. Raym. 928; 6 Mod. 36; *Moore v. Warren*, 1 Stra. 415; *Fletcher v. Sandys*, 2 Stra. 1248; *Turner v. Mead*, 1 Stra. 416; *Hoar v. Da Costa*, 2 Stra. 910; *Appleton v. Sweetapple*, Bayley, 6th ed. 234; 3 Doug. 137.

banking hours of the next day within which to present it for payment (c).

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Negotiable instruments, payable on demand, may be distributed into several classes, and the time within which they ought to be presented for payment and the consequences of a failure to make due presentment, are not precisely the same in every class.

Different
sorts of
instruments
payable on
demand.

Negotiable instruments, payable on demand, are common commercial bills of exchange, cheques, common promissory notes, bank notes, and bankers' cash notes and bankers' bills.

It is conceived that a common bill of exchange (d), payable on demand, ought, if the parties live in the same place, to be presented the next day after the payee has received it. If the bill must be sent by post to be presented, it ought to be posted on the day next after the day on which it was received, and then the person who receives it by post, that he may present it, should do so on the day next following the day on which he receives it.

Of a common
bill of
exchange
payable on
demand.

Such, also, are the general rules regulating the presentment of bankers' cheques, which are really bills of exchange; but, as cheques on bankers are now extremely common, it has been thought convenient to discuss the presentment of cheques more in detail in the Chapter relating to Cheques (e).

Of a cheque.

A common promissory note, payable on demand, differs from a bill payable on demand, or a cheque, in this respect; the bill and cheque are evidently intended to be presented and paid immediately, and the drawer may have good reasons for desiring to withdraw his funds from the control of the drawee without delay; but a common promissory note (f), payable on demand, is very often originally intended as a continuing security, and afterwards indorsed as such. Indeed, it is not uncommon for the payee, and

Of a common
promissory
note payable
on demand.

(c) *Pocklington v. Sylrester*, Chitty, 9th ed. 385; *Robson v. Bennett*, 2 Taunt. 388; 11 R. R. 614; *Rickford v. Ridge*, 2 Camp. 537; *Moule v. Brown*, 4 Bing. N. C. 266; 5 Sco. 691; *Harc v. Henty*, 30 L. J., C. P. 302. Next day must now mean next business day.

(d) The rule may be otherwise in respect of paper intended for

circulation, and some descriptions of bankers' paper. *Shute v. Robins*, M. & M. 133; 3 C. & P. 80. Or where peculiar difficulties interpose. See *James v. Houlditch*, 8 D. & R. 40.

(e) Ante, Chapter III. on CHEQUES.

(f) *Brooks v. Mitchell*, 9 M. & W. 15; Code, ss. 83 and 86.

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afterwards for the indorsee, to receive from the maker interest periodically for many years on such a note. And sometimes the note is expressly made payable with interest, which clearly indicates the intention of the parties to be, that though the holder may demand payment immediately, yet he is not bound to do so. It is, therefore, conceived, that a common promissory note payable on demand, especially if made payable with interest, is not necessarily to be presented the next day after it has been received in order to charge the indorser; and that, when the indorser defends himself on the ground of delay in presenting the note, it will be a question for the jury, whether, under all the circumstances, the delay of presentment was or was not unreasonable (*g*).

Of a bank
note and
bankers' cash
note.

Bank notes and bankers' cash notes differ again from other promissory notes in this, that they are intended to pass from hand to hand, and are issued that they may circulate as money, returning to the bank as seldom as possible; but they are not intended as a continuing security in the hands of any one holder. Therefore, a man who takes bank notes or bankers' cash notes in payment must present them (*h*), or forward them for presentment, the day after he receives them, in order to enable him, in the event of the bank failing, to sue the person from whom they were received on the consideration that was given for them (*i*). But, as it would be inconsistent with the very nature and design of such notes, that every man who takes them should present them for payment, it is sufficient to exonerate the taker from the charge of laches, if he circulated them within the time within which he ought otherwise to have presented them (*k*).

And without circulating them, it should seem that, if according to the course of business it be usual to retain such notes a reasonable time, that may be an excuse for omitting instant presentment (*l*). Moreover, the transmission of notes payable to bearer being attended with risk, the sender will, it seems, be allowed to cut the notes in halves, and send one set of halves on the next day, and one set the day after, or to send one set by coach and one

(*g*) *Bank of India v. Dickson*,
L. R., 3 Pr. C. 574; Code, s. 86.

(*h*) Vide the Chapter on
TRANSFER.

(*i*) *Camidge v. Allenby*, 6 B. & C.
373; 9 D. & R. 391; 30 R. R. 358.

(*k*) Ibid.; *Robinson v. Hawks-*
ford, 15 L. J., Q. B. 377; 9 Q. B.
52.

(*l*) See *Shute v. Robins*, M. &
M. 133; 3 Car. & P. 80.

by post (*m*). And it may make a difference in the time allowed for presentment if the notes be received by a servant or agent (*n*).

The same rules which govern the presentment and circulation of bank notes also apply to such bankers' paper as may be fairly considered part of the circulation medium of the country. Such are the bills of a country banker on his London correspondent (*o*).

Of other
bankers'
paper.

A bill or note on which no time of payment is specified is payable on demand (*p*).

Where no
time of pay-
ment is
specified.

Presentment must be made by the holder or his agent, at a reasonable hour, on a business day, at the proper place, to the person designated by the bill or note as payer or his agent, if, with the exercise of reasonable diligence, such person can be found. A presentment may be made through the Post Office (*q*). The bill or note must be exhibited to the person from whom payment is demanded, and delivered up forthwith to the party paying (*r*).

How to be
made.

Presentment for payment should be made during the usual hours of business, and, if at a banker's, within banking hours (*s*). If the party who is to pay the bill be not a banker, presentment may be made at any time of the day, when he may reasonably be expected to be found at his place of residence or business, though it be six, seven, or eight o'clock in the evening (*t*). And even though there be

At what hour.

(*m*) *Williams v. Smith*, 2 B. & Ald. 496 ; 21 R. R. 373.

(*n*) *James v. Houlditch*, 8 D. & R. 40.

(*o*) *Shute v. Robins*, M. & M. 133 ; 3 C. & P. 80.

(*p*) Code, s. 10 (b) ; *Whitlock v. Underwood*, 2 B. & C. 157 ; 3 D. & R. 356. And those words may be added without avoiding the bill. *Aldous v. Cornwall*, L. R., 3 Q. B. 573 ; 37 L. J. 201 ; 9 B. & S. 607 ; and see the Chapter on the FORM OF BILLS.

(*q*) Code, s. 45 (3) and (8). The Code says, where authorized by agreement or usage. The practice has been twice upheld. See ante, p. 21, note (*m*).

(*r*) Code, s. 52 (4) ; *Treacher v. Hinton*, 4 B. & Ald. 413 ; 23 R. R.

325 ; *Crowe v. Clay*, 9 Ex. 604.

(*s*) *Parker v. Gordon*, 7 East, 385 ; 5 Smith, 358 ; 8 R. R. 646 ; *Elford v. Teed*, 1 M. & Sel. 28 ; *Jameson v. Swinton*, 2 Taunt. 224 ; *Whitaker v. Bank of England*, 1 C., M. & R. 744 ; 6 C. & P. 700. In this case the bill had been presented at 11 A.M., and payment had been refused for want of assets ; it was afterwards, on the same day, presented after banking hours, at 6 P.M., assets having in the meantime been received. It was intimated by Lord Abinger, that the bank ought to have apprised the notary who presented the bill of the receipt of assets.

(*t*) *Barclay v. Bailey*, 2 Camp. 527 ; 11 R. R. 787 ; *Morgan v. Davison*, 1 Stark. 114.

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no person within to return an answer (*u*). Lord Tenterden, C. J. : "As to bankers, it is established, with reference to a well-known rule of trade, that a presentment out of hours of business is not sufficient ; but, in other cases, the rule of law is, that the bill must be presented at a reasonable hour. A presentment at twelve o'clock at night, when a person had retired to rest, would be unreasonable ; but I cannot say that a presentment between seven and eight in the evening is not a presentment at a reasonable time" (*x*).

Where, when
a note is made
payable at a
particular
place.

Presentment for payment at the right place is as important, in order to charge the antecedent parties, as presentment at the right time.

As we have already seen, if a promissory note be made in the body of it, payable at a particular place, presentment for payment there is necessary to charge either maker or indorsers, though it is otherwise if the place of payment be indicated by way of memorandum only, in which case presentment for payment there or elsewhere to the maker will suffice (*y*).

Where, when
a bill is made
payable at a
particular
place.

Where a bill was made or accepted payable at a particular place, it was formerly a point much disputed, whether a presentment at that place was necessary in order to charge the acceptor or other parties. At length, it was decided in the House of Lords that an acceptance, payable at a

(*u*) *Wilkins v. Judis*, 2 B. & Ad. 188 ; 1 M. & Ry. 41 ; 36 R. R. 540.

(*x*) *Wilkins v. Judis*, 2 B. & Ad. 188 ; 1 M. & Ry. 41 ; 36 R. R. 540 ; and see *Triggs v. Newnham*, 10 Moore, 249 ; 1 C. & P. 631 ; 28 R. R. 678.

In America it is held, that business hours, except in the case of banks, range through the whole day, down to the hours of rest in the evening. Where a note was made payable at a bank, a demand made at the bank upon the proper day after banking hours, the officers being there, and a refusal, the cashier stating that no funds were deposited for the purpose ; held that the demand was sufficient. See Byles on Bills, 6th American edition, p. 330.

(*y*) Ante, p. 14. Code, s. 87 ; *Saunderson v. Bowes*, 14 East, 500 ; 13 R. R. 299 ; *Howe v. Bowes*, 16 East, 112 ; 14 R. R. 319 ; *Rowe v. Young*, 2 B. & B. 165 ; 21 R. R.

91 ; *Williams v. Waring*, 10 B. & C. 2 ; 34 R. R. 306 ; *Emblin v. Dartnell*, 12 M. & W. 830 ; *Spindler v. Grellett*, 17 L. J., Ex. 6 ; 1 Ex. 384 ; *Nichols v. Bowes*, 2 Camp. 498. And this though the place be mentioned in a distinct sentence, preceded by a full stop. *Vanderdoucht v. Thelluson*, 19 L. J., C. P. 13 ; 8 C. B. 812 ; and so, too, in a debenture. *Thorn v. City Rice Mills*, L. R., 40 Ch. D. 357. The memorandum is no part of the note, *Eron v. Russell*, 4 M. & S. 505, though preceded by the words "payable at ;" *Masters v. Barretto*, 19 L. J., C. P. 50 ; 8 C. B. 433 ; *Price v. Mitchell*, 4 Camp. 200 ; 16 R. R. 775 ; though Lord Ellenborough held differently in *Trecothick v. Edwin*, 1 Stark. 468.

The repealed stat. 1 & 2 Geo. 4, c. 78, did not extend to promissory notes.

particular place, was a qualified acceptance, rendering it necessary, in an action against the acceptor, to aver and prove presentment at such place (z). This decision occasioned the passing of the 1 & 2 Geo. 4, c. 78, now repealed, by which it was enacted, that an acceptance, payable at a particular place, was a general acceptance, unless expressed to be payable there only, and not otherwise or elsewhere. On this statute it has been decided, that an acceptance is general, though the bill be made payable at a particular place by the drawer, and not by the acceptor (a). A declaration in an action against the *acceptor*, alleging a bill to be accepted payable at a banker's, need not aver presentment at the house of that banker. "Since the Statute," said the Court of Error, "a bill drawn generally on a party may be accepted in three different forms, *i.e.*, either first, generally; or, secondly, payable at a particular banker's; or, thirdly, payable at a particular banker's and not elsewhere. If the drawee accepts in the second form, payable at a banker's, he undertakes, since the statute, to pay the bill at maturity when presented for payment, either to himself or at the banker's. Here the bill was accepted according to the second of these three forms" (b).

This statute is repealed, and substantially re-enacted by the Code, with but slight variation.

Where a place of payment is specified, or the address of the drawee or acceptor is given in the bill, it must be presented there in order to charge the antecedent parties (c).

(z) *Rowe v. Young*, 2 B. & B. 165; 2 Bligh, 391; 21 R. R. 91.

(a) *Selby v. Eden*, 3 Bing. 611; 11 Moo. 511; *Fayle v. Bird*, 6 B. & C. 531; 9 Dowl. & R. 639; 2 C. & P. 303; *Roach v. Johnston*, H. & J. 246; ante, p. 265.

(b) *Halstead v. Skelton*, 5 Q. B. 92.

(c) Code, s. 45 (4) a and b. *Bernstein v. Usher*, 11 T. L. R. 356. As against the acceptor unless he insert the words "only and not elsewhere," it will be a general acceptance, Code, s. 19 (2) c, and presentment there, or indeed anywhere, is not necessary to charge him, sect. 52 (1); and even if he do insert those words, an omission to present there on the proper day will not discharge him (though it will the drawer and indorsers,

sect. 45), provided a subsequent presentment be made, unless he have expressly so stipulated. Sect. 52 (2). A drawer or indorser may by express stipulation on the bill vary his own liability in any way he pleases, sect. 16, if he can prevail on the indorsee to take it on such terms; he may exclude himself from taking advantage of any failure in making due presentment, or in giving notice of dishonour, or may decline all liability, *e.g.* by drawing or indorsing "sans recours"; he may, too, by parol, expressly or impliedly waive any failure already committed of which he has notice; a subsequent promise to pay is such an implied waiver. *Vaughan v. Fuller*, 2 Stra. 1246; Code, s. 46 (e).

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Where neither a place of payment nor address are given in the bill, it must be presented at his place of business, if known, and if not, at his ordinary residence, if known; in any other case to him wherever he can be found, or at his last known place of business or residence (*d*).

When a bill or note is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee, or acceptor, or maker, is necessary (*e*).

A personal demand on the drawee or acceptor or maker is not in general necessary (*f*), but where a bill is drawn upon or accepted, or a note made, by two or more persons who are not partners, if no place of payment is specified, presentment must be made to all of them (*g*).

Where the drawee or acceptor of a bill, or the maker of a note, is dead, if no place of payment be specified, presentment must be made to his personal representative, if there be one, and he can with reasonable diligence be found (*h*).

In an action
against the
indorser.

In an action against the *drawer*, or other indorser, if the bill be accepted, and payable at a particular place named by the *acceptor*, it is still necessary to prove presentment there if traversed (*i*). So, if the bill be *drawn*, payable at a particular place, presentment must be made there in order to charge the drawer. "The doubt," says Tindal, C.J., "which had been formed before the statute, as to the effect of an acceptance, payable at a particular place, was confined to the case where the question arose between the holder and the acceptor; in cases between the indorsee and the drawer, upon a special acceptance by the drawee, no doubt appears to have existed, but that a presentment at a place specially designated in the acceptance was necessary, in order to make the drawer liable upon the dishonour of the bill by the acceptor. Still less did the doubt ever extend to cases where the drawer directed, by the body of the bill, that the money should be paid in a particular place. Such, then, being the state of the drawer's liability at the time the

(*d*) Code, s. 45 (4) c and d.

(*e*) Code, s. 45 (5).

(*f*) *Matthews v. Haydon*, 2 Esp. 509; *Brown v. McDermott*, 5 Esp. 265. In America it has been held that a demand by a notary on the drawee in the street away from his place of

business is insufficient. Byles on Bills, 6th American edition, 316.

(*g*) Code, s. 45 (6).

(*h*) Code, s. 45 (7).

(*i*) *Gibb v. Mather*, 8 Bing. 214; 1 M. & Sc. 387; 2 C. & J. 254; 34 R. R. 688; *Saul v. Jones*, 28 L. J., Q. B. 37; 1 E. & E. 59.

statute was passed, it must still remain the same, unless that statute has made an alteration therein. But it appears to us that the statute neither intended to alter, nor has it in any manner altered, the liability of drawers of bills of exchange, but that it is confined in its operation to the case of acceptance alone" (*k*).

If the bill be made payable at a banker's a presentment should be made there (*l*). And if the bill be accepted payable at a banker's, which banker happens to become the holder at its maturity, that fact alone amounts to presentment, and no other proof is necessary (*m*). If a bill be made payable in a particular town, a presentment at all the banking houses there will suffice (*n*); if at one of two towns a presentment at either (*o*); if a particular house be pointed out by the bill as the acceptor's residence, a presentment to any inmate (*p*), or, if the house be shut up, at the door, will suffice (*q*).

But where a bill is accepted, payable at a particular place (*r*), it is not necessary in an action against the drawer to state the acceptance as such, and, therefore, not necessary to state it to be at a particular place, nor to allege presentment at that place. Such a presentment as the acceptance requires is merely matter of evidence (*s*). But if the special acceptance were alleged in the declaration, it might be necessary to state in an action against a *drawer or indorser* such a presentment as the acceptance required, though a general allegation might suffice after verdict (*t*). If a bill

Pleading.

(*k*) *Gibb v. Mather*, ubi supra. See *Parks v. Edge*, 1 C. & M. 429; 3 Tyrw. 364; *Harris v. Parker*, 3 Tyrw. 370; *Walter v. Cubley*, 2 C. & M. 151; 4 Tyrw. 87; 39 R. R. 739; *Boydell v. Harkness*, 3 C. B. 168.

(*l*) *Saunderson v. Judge*, 2 H. Bl. 509; 3 R. R. 492; *Harris v. Parker*, 3 Tyrw. 370.

(*m*) *Bailey v. Porter*, 14 M. & W. 44.

(*n*) *Hardy v. Woodrooffe*, 2 Stark. 319; 20 R. R. 689.

(*o*) *Beeching v. Gower*, Holt, N. P. C. 313; 17 R. R. 644.

(*p*) *Buxton v. Jones*, 1 M. & G. 83.

(*q*) *Hine v. Allely*, 4 B. & Ad. 624; 1 N. & M. 433; 38 R. R. 330.

(*r*) In an action against the acceptor, the bill may be described

as payable at a particular place, though not accepted payable there only. *Blake v. Beaumont*, 4 M. & G. 7.

(*s*) *Parks v. Edge*, 1 C. & M. 429; 3 Tyrw. 364; *Harris v. Parker*, 3 Tyrw. 370; *Hine v. Allely*, 4 B. & Ad. 624; 1 N. & M. 433; 38 R. R. 330; and see *Hawkey v. Borwick*, 4 Bing. 135; *Hardy v. Woodrooffe*, 2 Stark. 319; 20 R. R. 689.

(*t*) *Lyon v. Holt*, 5 M. & W. 250. The sufficiency, however, of such a general allegation, even after verdict, did not seem to be perfectly clear, at all events where no issue was taken on the presentment. In an action against the drawer, where the bill was drawn and accepted payable in London, but there was no traverse of the

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be made payable at a particular place, it is not necessary to state a presentment *to the acceptor* there ; it is sufficient to state a presentment at that place (*u*). An averment that a bill was presented to the acceptor will be satisfied by proof that it was presented at the place where it was made payable, though no person were there in attendance (*x*), and though the acceptor did not live there (*y*).

Payable at more than one place.

Where a promissory note is payable at either of two places, presentment at either of them will suffice. Thus, where a country bank note was made payable both at Tunbridge and in London, presentment in London was held sufficient, though it was proved that had it been presented at Tunbridge, the nearest place, it would have been paid (*z*). But it is conceived that presentment of a cheque to the London bankers of the drawer, though described on the cheque as agents, is insufficient, for the obligation to pay a cheque must in general depend on the state of the drawer's account, which the London agents may not know (*a*).

Conduct of the party presenting.

The party presenting should be ready and authorized to receive the money, and has no right (at least, unless usage require it) to impose on the drawee any trouble or risk in remitting the money elsewhere (*b*). If the holder die, presentment should be made by his personal representatives.

Consequence of not duly presenting.

The consequence of not duly presenting a bill or note is that all the antecedent parties are discharged from their liability, whether on the instrument, or on the consideration

general allegation of presentment, it was held that the statement of the venue London in the margin of the declaration cured the defect. *Wilmot v. Williams*, 14 L. J., C. P. 33 ; 7 M. & Gr. 1017 ; and see *Boydell v. Harkness*, 15 L. J., C. P. 233 ; 3 C. B. 168.

(*u*) *Shelton v. Braithwaite*, 8 M. & W. 252 ; *Hawkey v. Borwick*, 1 Y. & J. 376 ; 4 Bing. 135 ; 12 Moore, 478 ; *Philpot v. Bryant*, 3 C. & P. 244 ; 4 Bing. 717 ; 1 M. & P. 754 ; 29 R. R. 710 ; and see *Bush v. Kinnear*, 6 M. & Sel. 210 ; *Huffam v. Ellis*, 3 Taunt. 415 ; *Ambrose v. Hopwood*, 2 Taunt. 61 ; *De Bergareche v. Pillin*, 3 Bing. 476 ; 11 Moore, 350.

(*x*) *Hine v. Allely*, 4 B. & Ad. 624 ; 1 N. & M. 433 ; 38 R. R. 330 ; and see *Hardy v. Woodroffe*, 2 Stark. 319 ; 20 R. R. 689. So where a bill was drawn on an acceptor at 38, Minto Street, accepted generally, and when due, the acceptor having changed his residence, was presented to a lodger at No. 38, the presentment was held sufficient. *Burton v. Jones*, 1 M. & Gr. 83 ; 1 Scott, N. R. 19, S. C.

(*y*) *Hardy v. Woodroffe*, 2 Stark. 319 ; 20 R. R. 689.

(*z*) *Beeching v. Gower*, Holt, N. P. C. 313 ; 17 R. R. 644.

(*a*) *Bailey v. Bodenham*, 33 L. J., C. P. 252.

(*b*) *Ibid.*

for which it was given (*c*), save, as we have seen, the drawer of a cheque not injured by the delay or failure.

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The acceptor or maker, however, still continues liable in most cases, presentment not being generally necessary for the purpose of charging him (*d*). The action itself is sufficient demand, and that though the instrument be made payable on demand (*e*). But though the absence of demand be in general no defence, yet if the acceptor or maker pay on action brought without any previous demand, the court will take the question of costs into consideration (*f*).

Acceptor or maker still liable.

There are circumstances, however, which will excuse the neglect to present for payment (*g*).

Neglect to present when excused.

The fact that the holder has reason to believe that the bill or note will on presentment be dishonoured, does not dispense with the necessity for presenting for payment (*h*). The bankruptcy or insolvency of the drawee or maker is no excuse for not presenting, for many means may remain of obtaining payment by the assistance of friends or otherwise (*i*).

(*c*) Code, s. 45. In case of a bill or note payable after sight, it must, as we have seen, have been presented to the acceptor or maker previously. *Dixon v. Nuttal*, 1 C., M. & R. 307; Code, s. 39.

(*d*) Code, s. 52 (1). If a note be made in the body of it, payable at a particular place, presentment must be made there in order to charge either maker or indorsers (s. 87); but one unduly late, so as to discharge the indorser, will yet charge the maker (Code, ss. 52 (2) and 89); and so in an acceptance to pay at a particular place "only and not elsewhere," a presentment too late to charge the drawer or indorsers will yet charge the acceptor in the absence of an express stipulation to the contrary (s. 52 (2)).

(*e*) *Rumball v. Bull*, 10 Mod. 38; *Norton v. Ellam*, 2 M. & W. 461.

(*f*) *McIntosh v. Haydon*, Ry. & M. 362; 27 R. R. 757; *Rhodes v. Gent*, 5 B. & Ald. 244.

(*g*) Code, s. 46 (2).

(*h*) Code, s. 46 (2) a, prov. A declaration by the acceptor before a bill fell due that he would not

pay, though made in the drawer's presence, does not dispense with presentment to the acceptor, or notice of dishonour to the drawer. *Ex parte Bignold*, 1 Deac. 728; 2 Mont. & Ayr. 633.

(*i*) *Russell v. Langstaffe*, 2 Doug. 514; *Warrington v. Furber*, 8 East, 245; *Nicholson v. Gouthit*, 2 H. Bl. 609; 3 R. R. 527; *Ex parte Johnston*, 1 Mont. & Ayr. 622; *Esdaile v. Sowerby*, 11 East, 114; 10 R. R. 440; *Lafitte v. Slatter*, 6 Bing. 623; 31 R. R. 510; *Camidge v. Allenby*, 6 B. & C. 373; 30 R. R. 358. But closing a bank is a refusal to pay their notes to all the world. *Hoice v. Bowes*, 16 East, 112; 5 Taunt. 30; 14 R. R. 319. In *Rogers v. Langford*, 1 C. & M. 637, Lord Lyndhurst said, "It is possible, if you had returned the notes in due time, that might have done instead of presentment." See, too, *Turner v. Stones*, 1 D. & L. 122; *Sands v. Clarke*, 19 L. J., C. P. 84; *Robson v. Oliver*, 10 Q. B. 704. There is not the same option in presenting for payment as is given to the

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excused.

Delay in making presentment for payment is excused if caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or neglect. When the cause of delay ceases to operate, presentment must be made with reasonable diligence (*k*).

Presentment for payment is dispensed with when, after the exercise of reasonable diligence, it cannot be effected. If the acceptor or maker abscond, and his house be shut up, the bill or note may be at once treated as dishonoured; but if he have merely removed, an effort must be made to find him out (*l*).

When a bill or note is seized under an extent, the drawer and indorsers are not discharged by non-presentment, for laches is not imputable to the Crown.

Presentment for payment is also dispensed with when the drawee is a fictitious person; and as regards the drawer, when the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented (*m*); and so, too, as regards an indorser, if the bill or note were made for his accommodation, and he has no reason to expect that it would be paid if presented. The tendency of the Code seems, therefore, to make it more difficult to excuse presentment for payment than notice of dishonour (*n*).

Not necessary
to charge a
guarantor.

Neglect to present has been held not to discharge a man who guarantees the due payment of a bill or note (*o*); and

holder by s. 41 in presenting for acceptance where the drawee is dead or bankrupt.

(*k*) Code, s. 46 (1).

(*l*) Ibid. (2) a; *Anon.*, 1 Ld. Ray. 743; *Hardy v. Woodrooffe*, 2 Stark. 319; 20 R. R. 689; *Hine v. Allely*, 4 B. & Ad. 624; 1 N. & M. 433; 38 R. R. 330; *Collins v. Butler*, 2 Stra. 1087; *Sands v. Clarke*, 19 L. J., C. P. 84; 8 C. B. 751. If the drawer could not be found, it was sufficient to plead that fact without averring due search: *Starke v. Cheesman*, Carthew, 509; 1 Ld. Ray. 538; but if presentment were alleged, evidence that the drawer could not be found was admissible. *Leeson v. Pigott*, circa 1788; *Burgh v. Legge*, 5 M. & W. 421.

(*m*) *Terry v. Parker*, 1 Nev. &

Per. 752; 6 A. & E. 502; *Prideaux v. Collier*, 2 Stark. 57; *Hill v. Heap*, D. & R., N. P. C. 57; 25 R. R. 791; *De Berdt v. Atkinson*, 2 H. Bla. 336; *Wirth v. Austin*, L. R., 10 C. P. 689; Code, s. 46 (2) b and c; *i.e.*, when the drawee has no effects of the drawer in his hands, nor, it should seem, reasonable probability of receiving any. *Cumming v. Shand*, 29 L. J., Ex. 129. But presentment must be made to charge an indorser. *Saul v. Jones*, 28 L. J., Q. B. 37; 1 E. & E. 59.

(*n*) Code, s. 46. See ante, p. 248.

(*o*) *Hitchcock v. Humfrey*, 5 M. & G. 559; *Walton v. Mascall*, 13 M. & W. 453. Nor is a guarantor entitled in general to notice of dishonour; but when by custom it is usual to guarantee, instead

where a man became guarantor for the vendee of goods, who accepted a bill for the amount and then became bankrupt, the notorious insolvency of the vendee was held to excuse the drawer's presentment, so as to enable him to charge the guarantor without, unless it could be shown that the bill would have been paid if duly presented, though it would have been otherwise in an action on the bill (*p*).

There may also be a waiver, express or implied, of due presentment (*q*). An implied waiver would be gathered from the conduct of the party, as when a man with notice of the failure or undue delay in presentment, promises to pay the bill, or makes or promises to make a partial payment on account (*r*). The defendant's part payment or promise to pay after the bill or note is due, is *prima facie* evidence of presentment (*s*).

Waiver.

A bill or note is dishonoured by non-payment when either it is duly presented and payment is refused, or cannot be obtained, or presentment being excused it remains overdue and unpaid (*t*).

Dishonour by
non-payment.

Subject to the other provisions of the Code, an immediate right of recourse against the drawer and indorsers accrues to the holder (*u*).

of indorsing bills of exchange, the party guaranteeing is, as regards his rights against the acceptor, in much the same position as an indorser: *Ex parte Bishop*, L. R., 15 Chan. D. 400; and consequently may well be entitled to expect due presentment, and perhaps, too, notice of dishonour.

(*p*) *Warrington v. Furber*, 8 East, 242; 6 Esp. 89; *Smith v. Bank of New South Wales*, L. R., 4 P. C. 194.

(*q*) Code, s. 46 (2) c.

(*r*) *Vaughan v. Fuller*, 2 Stra. 1246; *Hopley v. Dufresne*, 15 East, 275; 13 R. R. 463; *Huddock v. Bury*, 7 East, 236; *Hodge v. Fillis*, 3 Camp. 463; *Goodall v. Dolly*, 1 T. R. 712; 1 R. R. 372;

Anson v. Bailey, Bull. N. P. 276.

As to express waiver inserted in the bill itself, see Code, s. 16.

(*s*) *Crozon v. Worthen*, 5 M. & W. 5; *Lundie v. Robertson*, 7 East, 232; *Campbell v. Webster*, 15 L. J., C. P. 4; 2 C. B. 258; *Greenway v. Hindley*, 4 Camp. 52; *Cordery v. Colville*, 32 L. J., C. P. 210.

(*t*) Code, s. 47 (1).

(*u*) *Ibid.* (2). The other provisions seem to be ss. 48 and 51, as to notice of dishonour and protest necessary to preserve that right of recourse; and ss. 15 and 65-68, as to referee in case of need; and acceptance and payment for honour.

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A BILL is discharged by payment in due course by or on behalf of the drawee or acceptor.

Payment in due course means payment made at or after the maturity of the bill to the holder thereof in good faith, and without notice that his title to the bill is defective.

Payment by a party other than the acceptor or maker, or premature payment by him, does not discharge the bill or note, and it can in general be re-issued ; but in accommodation bills, payment in due course by the party accommodated is a discharge of the bill (a).

(a) Code, s. 59. Holder means payee or indorsee of a bill or note (payable to order) in possession of it, or bearer of one payable to bearer. Defects in title, as defined in s. 29, are fraud, duress, illegal

Payment should be made to the true holder of the bill ; for payment to any other party is no discharge to the acceptor ; unless, indeed, the money paid finds its way into the holder's hands, and the holder has treated it as received in liquidation of the bill. A. drew a bill upon defendant, which defendant accepted ; A. then indorsed it to the plaintiffs, his bankers, who entered it to the credit of plaintiffs account, and at maturity, presented it to the defendant for payment, and it was dishonoured. The plaintiffs then debited A. with the amount, but did not return him the bill. A few days afterwards defendant paid the amount to A. ; A. still continued his banking account with the plaintiffs, and at different times paid in more money than was sufficient to cover the amount of the bill, and all the preceding items which stood above it in the account, though there was always a balance against him larger than the amount of the bill. A. failed, and the plaintiffs proved for the whole of their balance under his commission. They then brought this action on the bill against the defendant, the acceptor. Best, C.J. : "The payment to A. would not of itself have discharged the defendant, the plaintiffs having been at that time the holders, and entitled to the amount of the bill ; but the ground on which the defendant is discharged is, that the plaintiffs not only entered the bill to the credit of A., but treated it as having been paid " (b).

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MADE.

There are some cases in which payment to a wrongful holder is protected, and others in which it is not (c). If a bill or note, payable to bearer, either originally made so, or become so by an indorsement in blank, be lost or stolen, we have seen that a *bonâ fide* holder may compel payment. Not only is the payment to a *bonâ fide* holder protected, but payment to the thief or finder himself will discharge the

Effect of
payment to
a wrongful
holder of
instruments
payable to
bearer.

consideration, breach of faith, &c. As to re-issue, see Chapter on TRANSFER. The Stamp Acts are not touched by the Code ; hence, in the case of bankers issuing bank notes unstamped under a composition in lieu of stamps, payment at maturity does not extinguish such bank notes, as under the Stamp Acts they are re-issuable *ad infinitum*.

(b) *Field v. Curr*, 5 Bing 13 ; 2 Moo. & P. 46. Where money is paid into a bank on the joint

account of persons not partners in trade the bankers are not discharged in payment of the cheque of one of those persons, drawn without the authority of the others ; *Innes v. Stephenson*, 1 Moo. & Rob. 145 ; *Stone v. Marsh*, R. & M. 369 ; unless one alone afterwards becomes entitled to receive it. *Stewart v. Lee*, Mood. & M. 160 ; see ante, p. 28.

(c) As to payment of a forged bill, see post, the Chapter on FORGERY OF BILLS.

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maker or acceptor (*d*), provided such payment were not made with knowledge or suspicion of the infirmity of the holder's title, or under circumstances which might reasonably awaken the suspicions of a prudent man (*e*). "For it is a general rule, that where one or two innocent persons must suffer from the acts of a third, he who has enabled such third person to occasion the loss must sustain it" (*f*). And supposing the equity of the loser and payer precisely equal, there is no reason why the law should interpose to shift the injury from one innocent man upon another. But, if such payment be made under suspicious circumstances, or without reasonable caution, or out of the usual course of business, it will not as between all parties and for all purposes discharge the payer (*g*). Payment before the bill or note is due, or long after it is due, or, in case of a cheque, long after it is drawn, or where the marks of cancellation are on the instrument, are examples of payment out of the usual course of business.

And, therefore, though a cheque be really drawn by a banker's customer, but torn in pieces before circulation by the drawer, with intention of destroying it, and a stranger, picking up the pieces, pastes them together, and presents the cheque soiled and so joined together to the banker, and he pays it, the banker cannot charge his customer with this payment, for the instrument was cancelled, and carried with it reasonable notice that it had been cancelled (*h*).

Of instru-
ments not
payable to
bearer.

If the bill or note be not payable to bearer, but transferable by indorsement only, and be paid to a party whose title is made through the forged indorsement, the payer is not discharged (*i*).

(*d*) *Smith v. Sheppard*, Sel. Ca. 243. Ante, p. 192.

(*e*) We have seen that nothing short of fraud will affect the title of a transferee for value.

(*f*) *Lickbarrow v. Mason*, 2 T. R. 70; 1 R. R. 425. A

(*g*) There is at present no decided case establishing that a party honestly paying is in as good a situation as a party honestly discounting. See, however, the observations of Best, C.J., in *Snow v. Peacock*, 2 C. & P. 221, and the observations of Parke, B., in *Roberts v. Tucker*, 16 Q. B. 575. The question as to the validity of a payment usually arises between a customer and his banker. But

a banker paying a bill made payable at his bank must, it is conceived, exercise due caution.

(*h*) *Scholey v. Ramsbottom*, 2 Camp. 485.

(*i*) Code, s. 24. A banker, as we have seen, paying a cheque to order bearing a forged indorsement, is not liable, and the same protection has been extended to a bill of exchange on demand on him, which is practically the same thing. Ante, pp. 27 and 257. It has been contended, that as each indorsement is a warranty of the validity of the prior indorsements, an indorser, who has been paid by the acceptor, is liable, if the indorsements to him

Nash v. De Freville
[1900] 2 Q.B. 72.

A bill is not discharged, and finally extinguished, until paid by or on behalf of the acceptor ; nor a note until paid by or on behalf of the maker.

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Payment by
acceptor.

Payment by
drawer.

It was long an unsettled question, whether payment in part or in full by the drawer to the holder will discharge the acceptor *pro tanto*, or whether the holder may, nevertheless, recover the whole amount from the acceptor, and hold an equivalent to the amount received from the drawer, as money received of the acceptor to the drawer's use (*k*). It has been thought that the holder can only recover of the acceptor the amount of the bill minus the sum paid by the drawer (*l*). The acceptor being the principal, and the drawer the surety, it might seem that a payment by the drawer discharges the acceptor's liability to the holder *pro tanto*, and makes the acceptor liable to the drawer for money paid to his use, and that if the drawer pay the whole bill, nominal damages only can be recovered by the holder of the acceptor (*m*). The better opinion, however, seems to be, that to an action against the acceptor, payment by the drawer is no plea, but

turn out invalid, to be sued by the acceptor on an implied undertaking that he, as holder, was entitled to receive the amount of the bill. *East India Company v. Tritton*, 3 B. & C. 280 ; 5 Dowl. & R. 214 ; 27 R. R. 353 ; *Smith v. Mercer*, 6 Taunt. 76 ; 1 Marsh. 453 ; 16 R. R. 576. But by Code, s. 55, he only guarantees his title to his immediate or any subsequent indorsee. L'endosseur est garant solidaire avec les autres signataires de la vérité de la lettre ainsi que du paiement à l'échéance. Pardessus, 376. Tous ceux qui ont signé, accepté, ou endossé, une lettre de change, sont tenus, à la garantie solidaire envers, le porteur. Code de Commerce, 140 ; *Lorell v. Martin*, 4 Taunt. 799 ; 14 R. R. 668. See *McGregor v. Rhodes*, 25 L. J., Q. B. 318 ; 6 E. & B. 266 ; *Robarts v. Tucker*, 16 Q. B. 575. The true holder can sue for money had and received. In *Bobbett v. Pinket*, L. R. 1 Ex. Div. 368, the drawer (not the payee) was held entitled to recover. See ante, p. 30.

(*k*) In *Johnson v. Kennion*, 2 Wils. 262, recognized in *Walwyn*

v. St. Quintin, 1 B. & B. 658, it was held, that the holder was entitled to recover the whole amount ; but in *Bacon v. Searles*, 1 H. Bl. 88, it was considered that he could recover only the difference, and the report of the case of *Johnson v. Kennion*, was reflected on. See *Pierson v. Dunlop*, Cowp. 571 ; *Reid v. Furnival*, 1 C. & Mees. 538 ; 5 C. & P. 499 ; 38 R. R. 684, S. C. ; *Browne v. Rivers*, Doug. 455. A payment by a subsequent party, if made *on behalf* of the acceptor, is a discharge of the bill, s. 59 (1), but if not so made it merely puts the payer into the position of a prior party to whom a bill is transferred a second time, *Callow v. Lawrence*, 3 M. & S. 95 ; 15 R. R. 423.

(*l*) Lord Abinger appears to have so ruled at *nisi prius*. *Hemming v. Brook*, 1 Car. & M. 57.

(*m*) Mais comme ces différents débiteurs son débiteurs envers lui de la même chose, la paiement qui lui est fait par l'un d'eux libère d'autant envers lui les autres Poth. 106 ; see *Hemming v. Brook*, 1 Car. & M. 57.

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only converts the holder into a trustee for the drawer when the holder afterwards recovers of the acceptor (*n*). But payment in due course of an accommodation bill by the party accommodated is a complete discharge of the bill (*o*).

Meaning of
the word
"retire."

The verb "*retire*" in its application to bills of exchange is an ambiguous word. In its ordinary sense it is used of an indorser who takes up a bill by handing the amount to a transferee, after which the indorser holds the instrument with all his remedies against prior parties intact. But it is sometimes used of an acceptor, by whom when a bill is taken up or retired at maturity it is in effect paid, and all the remedies on it extinguished (*p*).

By a stranger.

Payment by a stranger of the amount of a bill to the bankers, at whose house the bill is made payable by the acceptor, the party paying obtaining possession of the bill, is not a payment by the acceptor (*q*).

By one, who
is both
agent for the
acceptor and
also indorser.

If a banker at whose house a bill is made payable happen also to be indorser of the bill, and on the bill being brought to him when it becomes due he takes it up without observation, it is a question of fact for a jury whether he paid it as agent of the acceptor or merely retired it as indorser (*r*).

(*n*) *Jones v. Broudhurst*, 9 C. B. 173; *Randall v. Moon*, 12 C. B. 261; but see *Williams v. James*, 19 L. J., Q. B. 445; 15 Q. B. 498, S. C.; *Jewell v. Parr*, 13 C. B. 909; 16 C. B. 684; *Kemp v. Balls*, 10 Exch. 607; *Belshaw v. Bush*, 11 C. B. 191; *James v. Isaacs*, 12 C. B. 791. In an action by indorsee against acceptor, where the consideration for the acceptance had failed, except as to an ascertained amount, for which there was a set-off, and the drawer had paid the indorsee in full, an equitable plea stating these facts was held good. *Agra and Masterman Bank v. Leighton*, L. R., 2 Ex. 56; 36 L. J. 33. Payment by a drawer or indorser is no discharge of the bill. Code, s. 59 (2).

(*o*) Code, s. 59. *Lazarus v. Cowie*, 3 Q. B. 459. Of bills not strictly accommodation bills. *Cook v. Lister*, 32 L. J., C. P. 121. The late Mr. Justice Willes

expressed an opinion that payment or satisfaction by a stranger is *prima facie* good, and that the assent of the debtor will be presumed. That very learned judge refers to the rule of the civil law, "*Debitorem ignarum seu etiam invitum solvendo liberare possumus.*" See the observations of Willes, J., in *Cook v. Lister*, 32 L. J., C. P. 126, and in *Manchester Warehouse Company v. Bertie*, C. P., T. T. 1866. But this presumption may be rebutted. *Walter v. James*, L. R., 6 Ex. 124; 40 L. J. 104.

(*p*) *Elsam v. Denny*, 15 C. B. 87; Code, ss. 37 and 59.

(*q*) *Deacon v. Stodhart*, 2 Man. & Gr. 317. As to payment by a stranger, see *Jones v. Broudhurst*, supra; *Simpson v. Eggington*, 10 Exch. 845; 24 L. J., Exch. 312; *Kemp v. Balls*, 10 Exch. 607; note (*o*), supra.

(*r*) *Pollard v. Ogden*, 2 E. & B. 459.

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The acceptor of a bill, whether inland or foreign, or the maker of a note, should pay (s) it on a demand made, at any time within business hours, on the day it falls due. And, if it be not paid on such demand, the holder may instantly treat it as dishonoured (t).

When to be made.

But the acceptor has the whole of that day within which to make payment ; and though he should, in the course of that day, refuse payment, which refusal entitles the holder to give notice of dishonour, yet if he subsequently, on the same day, makes payment, the payment is good, and the notice of dishonour becomes of no avail (u).

At what time of day.

A plea of tender (x), by the acceptor after the day of payment, is insufficient (y).

Subsequent tender.

If a bill or note be paid before it be due, and is afterwards indorsed over, it is a valid security in the hands of a *bonâ fide* indorsee. "I agree," says Lord Ellenborough, "that a bill paid at maturity cannot be re-issued, and that no action can be afterwards maintained upon it, by a subsequent indorsee. A payment before it comes due, however, I think, does not extinguish it any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills and notes, for it would be

Before due.

(s) If a banker who has funds in his hands refuse to pay a cheque, he thereby subjects himself to an action at the suit of his customer, the drawer. *Marzett v. Williams*, 1 B. & Ad. 415; 1 Tyrw. 77; 35 R. R. 329; *Rolin v. Steward*, 14 C. B. 595, ante, p. 19; *Cumming v. Shand*, 29 L. J., Exch. 129. So, too, if he wrongfully refuse to pay a bill of his customer, made payable at the banking house; but in order to charge the banker, the presentment must be within banking hours. *Whitaker v. The Bank of England*, 1 C., M. & R. 744; 6 C. & P. 700; 1 Gale, 54. See the Chapter on PRESENTMENT FOR PAYMENT.

(t) *Ex parte Moline*, 1 Rose, 303; *Burbidge v. Manners*, 3 Camp. 193; 13 R. R. 786; *Leftley v. Mills*, 4 T. R. 170; 2 R. R. 350; *Haynes v. Birks*, 3 B. & P. 599.

(u) *Hartley v. Case*, 1 C. & P. 555; 4 B. & C. 339; 6 D. & R. 505. No action lies until days of grace have expired, *Wells v.*

Giles, 2 Gale, 209; *Kennedy v. Thomas*, [1894] 2 Q. B. 759.

(x) As to payment where there are nominal damages, see *Beaumont v. Greathead*, 2 C. B. 494.

(y) *Hume v. Peplow*, 8 East, 168; 9 R. R. 399. But a drawer or indorser is not bound to pay till notice and request; and, therefore, a plea of tender, after the bill became due, may be good, if pleaded by a drawer or indorser. And as a drawer and indorser has a reasonable time to pay, he may, it should seem, plead a tender even after request, and of principal only, without interest. *Walker v. Barnes*, 5 Taunt. 240; 1 Marsh. 36; 15 R. R. 655; *Soward v. Palmer*, 8 Taunt. 277; 2 Moo. 274; 19 R. R. 515; but see *Siggers v. Lewis*, 1 C., M. & R. 370; 4 Tyrw. 847; 2 Dowl. 681; where a plea that the action was commenced before a reasonable time had elapsed for the defendant, the indorser, to pay the bill, was held ill.

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impossible to know whether there had not been an anticipated payment of them" (z).

If an acceptor discount his own acceptance, he may transfer it, and the drawer and indorsers may become liable to a subsequent holder, even with notice (a). But if the acceptor is the holder in his own right when the bill falls due, it is extinguished (b).

If the holder constitute any one of the parties liable to him his executor, and die, the appointment might in *law* have been equivalent to a release, though it was otherwise in equity unless such were the intention of the testator (c). A premature release will not, any more than a premature payment, protect the releasee from liability to a subsequent holder without notice (d).

But the payment of a note payable on demand will be a defence, even against an indorsee for value without notice (e); for the statute, which imperatively prohibited the re-issuing of such a note, dispensed with notice.

After action brought.

A payment after action brought will not prevent the holder from proceeding for his costs (f).

Payment by bankers' notes and cheques.

If the bill be paid, the payer has a right to insist on its being delivered up to him; but if it be not paid the holder should keep it. Yet it has been held, that an agent is justified by the usage of trade, in delivering it up on receiving a cheque, though that cheque is afterwards dishonoured (g). But the drawers or indorsers, in such a case, would be discharged, for they have a right to insist on the production of the bill, and to have it delivered up on payment by them (h). If the holder of a cheque receive bank notes

(z) *Burbidge v. Manners*, 3 Camp. 193; 13 R. R. 786; *Morley v. Culverwell*, 7 M. & W. 174. See *Harmer v. Steele*, 4 Exch. 1; *Lazarus v. Cowie*, 3 Q. B. 459; *Jewell v. Parr*, 13 C. B. 909; *Attenborough v. Mackenzie*, 25 L. J., Exch. 244.

(a) *Attenborough v. Mackenzie*, 25 L. J., Exch. 244. Before maturity any party retiring a bill or note may re-issue it without more, Code, s. 37; but after maturity a drawer or indorser who has paid a bill or note must strike out his own and subsequent indorsements before re-issuing it. Code, s. 59 (2) b. A drawer cannot in such case re-issue a bill payable

to payee's order, s. 59 (2), a.

(b) Code, s. 61.

(c) *Freakley v. Fox*, 9 B. & C. 130; *Strong v. Bird*, L. R. 18 Eq. 315; Code, s. 61. And see ante, p. 64.

(d) *Dod v. Edwards*, 2 C. & P. 602; Code, s. 62 (2).

(e) *Bartrum v. Cuddy*, 9 Ad. & E. 275; 1 Per. & Dav. 207. Payment in due course is a discharge of a bill or note, Code, s. 59.

(f) *Toms v. Powell*, 6 Esp. 40; 7 East, 536; Ord. XXII. r. 6 (a).

(g) *Russell v. Hankey*, 6 T. R. 12; 3 R. R. 102.

(h) *Powell v. Roche*, 6 Esp. 76; Code, s. 52 (4).

instead of cash, and the banker fail, the drawer is discharged (*i*). If bonds be accepted in payment, the payment is good even though they prove to be valueless (*k*).

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A set-off does not amount to payment, unless it be mutually agreed that one demand shall be set off against the other. Such an agreement amounts to payment (*l*). And an agreement, even by one of several partners, with a debtor to the firm, that a separate debt due from the partner shall be set off against a joint debt due to the firm, binds the firm (*m*). Credit given to the holder of a bill by the party ultimately liable is tantamount to payment (*n*). Where a banker takes from a customer and his surety a promissory note, intended to secure a running balance, and makes advances on the faith of the note, it is not discharged by subsequent unappropriated repayments made by the customer to the banker, but still continues as a security for the existing balance (*o*).

What
amounts to
payment.

There are many circumstances under which a legacy by a debtor to his creditor, of equal or greater amount than the debt, will be considered a satisfaction of the debt. But a legacy to the holder of a *negotiable* bill or note can never be considered as a satisfaction of the debt on that instrument. For a legacy is a satisfaction when it may be presumed to have been the intention of the testator that it should so operate ; but that cannot be presumed, when, from the assignable nature of the debt, the testator could not tell whether or no the legatee was at the time of the bequest his creditor (*p*).

Legacy.

Where a man is indebted to another in several items, and makes a partial payment, it often becomes a question, important not only to the parties themselves, but to third persons, to which of the items the payment shall be imputed.

Appropriation
of payments.

The rule of the Roman law, and therefore in general of Continental law, is, that a payment shall be appropriated, first, according to the intention of the debtor at the time of

(*i*) *Vernon v. Boterie*, 2 Show. 303. And see *Guardians of the Lichfield Union v. Green*, 1 H. & N. 884.

(*k*) *Schræder's Case*, L. R., 11 Eq. 131.

(*l*) *Callander v. Howard*, 19 L. J., C. P. 312 ; 10 C. B. 290.

(*m*) *Wallace v. Kelsall*, 7 M. &

W. 264 ; see *Gordon v. Ellis*, 7 M. & G. 607 ; 2 C. B. 821.

(*n*) *Atkins v. Owen*, 4 Nev. & Man. 123 ; 2 Ad. & El. 35 ; *Bell v. Buckley*, 11 Exch. 631.

(*o*) *Pease v. Hirst*, 10 B. & C. 122 ; 5 M. & Ry. 88 ; 34 R. R. 343.

(*p*) *Carr v. Eastabrook*, 3 Ves. 561.

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making it (*q*); but if that be unknown, then, secondly, at the election of the creditor (*r*), signified to the debtor at the time of receiving it (*s*). If the intention of neither be known, payment must then be appropriated according to the presumed intention of the debtor, and it will be presumed that he meant to discharge such debts as were most burdensome: as, a debt carrying interest, rather than one which carries none; a debt secured by a penalty, rather than one resting on a simple stipulation; a debt on which he may be made a bankrupt, rather than one which will not subject him to such a liability. If all the debts are equal in degree, the payment must then be imputed to them according to their respective priority in the order of time (*t*). Such is the rule of the civil law, from which, in some particulars, the common law differs.

Wherever, according to the English law, the transactions between the two parties form one general account current, or are treated by them as such, payments are to be imputed to debts in the order of time, and the balance is to be struck at the foot of the account (*u*). But, if an unappropriated payment be made on account of several distinct insulated debts, which cannot be considered in the light of a running account between the parties, the common law then differs from the civil law and gives the creditor a right of appropriating it at any time before action (*x*), as he pleases (*y*), provided a prior appropriation have not been communicated to the debtor.

(*q*) Quotiens quis debitor ex pluribus causis unum debitum solvit, est in arbitrio solventis dicere quod potius debitum voluerit solutum, et quod dixerit, id erit solutum. D. 46, 3, 1. Vide etiam Cod. 8, 43, 1.

(*r*) Quotiens vero non dicimus ad quod solutum sit, in arbitrio est accipientis cui potius debito acceptum ferat. D. 46, 3, 1. Cod. 8, 43, 1.

(*s*) Dum in re agenda (in re præsenti hoc est statim atque solutum est) hoc fiat; ut vel creditori liberum sit non accipere vel debitori non dare, si alio nomine exsolutum quis eorum velit: cæterum postea non permititur. D. 46, 3, 1. 2, 3.

(*t*) D. 46, 3. If all the debts were equal and alike in every respect, the sum paid was applied

to a rateable reduction of them all. A rateable appropriation is also sometimes made by the English law. See an example in *Farenc v. Bennett*, 11 East, 36; 10 R. R. 425. But this presumption is capable of being rebutted by circumstances. *Henniker v. Wigg*, 4 Q. B. 782; *City Discount Co. v. McLean*, L. R., 9 C. P. 693.

(*u*) *Clayton's case*, 1 Meriv. 604; 15 R. R. 161; *Geake v. Jackson*, 36 L. J., C. P. 108.

(*x*) *Simpson v. Ingham*, 2 B. & C. 65; 3 D. & R. 249; 26 R. R. 273; *Mills v. Fowkes*, 5 Bing. N. C. 455; 7 Scott, 444; *The Mecca*, [1897] Ap. Ca. 286.

(*y*) *Clayton's case*, 1 Meriv. 604; 15 R. R. 161; *Bodenham v. Purchas*, 2 B. & Ald. 39; 20 R. R. 342; *Storeld v. Fude*, 4 Bing. 12; 12 Moo. 370; *Field v. Carr*, 2

An appropriation which would have the effect of paying one man's debt with another man's money will not be allowed (*z*). Nor can there be an appropriation which would deprive a debtor of a benefit, such as the taxation of costs (*a*). And it seems that an appropriation by the creditor, without the knowledge or consent of the debtor, will not of itself afford sufficient ground for raising against the debtor a new promise to pay (*b*).

A payment may be imputed to a demand for which the creditor could not recover at law (*c*). But where a payment is made by a debtor on account generally, the court will not refer it to a debt barred by the statute, if it can be attributed to any debt not so barred (*d*). The law will ascribe a payment to a legal debt, rather than to an illegal one (*e*). A party receiving money for the use of another from a third person, which is not properly a payment but a set-off, cannot appropriate the money without the knowledge or consent of him for whom it has been received (*f*). It has been held, that a payment may be appropriated to a disputed debt, if it be really a good debt (*g*).

There are cases where a payment is appropriated by law to several debts proportionally.

Rateable
appropriation.

Thus, where a principal debtor has assigned his effects to a trustee for his creditors, a creditor who has a guarantee for part of his debt will be forced, even at law, to apply in

Moo. & P. 46 ; 5 *Bing.* 13 ; *Godard v. Cox*, 2 *Stra.* 1194 ; *Bosanquet v. Wray*, 6 *Taunt.* 597 ; 2 *Marsh.* 319 ; 16 *R. R.* 677 ; *Kirby v. Duke of Marlborough*, 2 *M. & Sel.* 18 ; 14 *R. R.* 573 ; *Plomer v. Long*, 1 *Stark.* 153 ; *Woodroffe v. Hayne*, 1 *C. & P.* 600 ; *Shaw v. Picton*, 4 *B. & C.* 715 ; 7 *Dowl. & R.* 201 ; 28 *R. R.* 455 ; *Marsh v. Houlditch*, Chitty, 9th ed. 404 ; *Hammersley v. Knowlys*, 2 *Esp.* 666 ; 5 *R. R.* 764 ; *Birch v. Tebbutt*, 2 *Stark.* 74 ; *Marryatts v. White*, 2 *Stark.* 101 ; *Meggott v. Mills*, 1 *Lord Raym.* 286 ; *Dawe v. Houldsworth*, Peake, 64 ; 15 *R. R.* 595, n. ; *Peters v. Anderson*, 5 *Taunt.* 596 ; 15 *R. R.* 592 ; *Wright v. Laing*, 3 *B. & C.* 165 ; 4 *Dowl. & R.* 783 ; 27 *R. R.* 313 ; *Gough v. Davies*, 4 *Price*, 200 ; 18 *R. R.* 697 ; *Strange v. Lee*, 3

East, 484 ; *Simpson v. Ingham*, 2 *B. & C.* 65 ; 3 *Dowl. & R.* 249 ; 26 *R. R.* 273 ; *Mills v. Fowkes*, 5 *Bing. N. C.* 455 ; 7 *Scott*, 444.

(*z*) *Thompson v. Brown*, 1 *M. & M.* 40 ; 31 *R. R.* 710.

(*a*) *James v. Child*, 2 *Tyrwh.* 735 ; 2 *C. & J.* 252.

(*b*) *Nash v. Hodgson*, 6 *De G., M. & G.* 474 ; 25 *L. J., Chan.* 186 ; 23 *L. J., Chan.* 780.

(*c*) *Crookshanks v. Rose*, 1 *M. & R.* 100 ; 5 *C. & P.* 19 ; 38 *R. R.* 788.

(*d*) *Nash v. Hodgson*, 6 *De G., M. & G.* 474 ; 25 *L. J., Chan.* 186 ; 23 *L. J., Chan.* 780.

(*e*) *Wright v. Laing*, 3 *B. & C.* 165 ; 4 *Dowl. & R.* 783 ; 27 *R. R.* 313.

(*f*) *Waller v. Lacy*, 1 *M. & Gr.* 54 ; 1 *Scott*, *N. R.* 186.

(*g*) *Williams v. Griffith*, 5 *M. & W.* 300.

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ment.

discharge thereof a rateable part of any payment that he may receive from the trustee (*h*).

Part payment of the debt by the party liable is no discharge of the whole debt (*i*), but part payment by a stranger may be (*k*). And it has been held, that where a promissory note is due and unpaid, so that not only the principal, but interest (at least to a nominal amount) is due also, the principal may be taken in satisfaction of the debt and damages (*l*).

When pay-
ment will be
presumed.

As the lapse of twenty years (*m*) is sufficient to raise a presumption that a bond has been paid, so it has been held to be a good defence to an action on a promissory note payable on demand (*n*). But if during this period the plaintiff was an alien enemy, and payment to him would consequently have been illegal, such a presumption would not, it seems, arise (*o*).

Evidence of
payment.

The production of a cheque drawn by the defendant on his banker, and indorsed by the plaintiff, is evidence of payment (*p*); but not if there have been several transactions between the parties, without evidence to connect the delivery of the cheque with the payment in question (*q*). A bill or note once in circulation overdue, and coming out of the hands of the acceptor or maker, is presumed to be paid. Thus, it is a maxim of the Scotch law, *chirographum apud debitorem repertum præsimitur solutum*. But the mere production of a bill from the custody of the acceptor is not *primâ facie* evidence of his having paid it, without proof of its having been once in circulation after it had been accepted (*r*).

(*h*) *Baidwell v. Lydall*, 7 Bing. 489; 33 R. R. 540; see *Raikes v. Todd*, 1 P. & D. 138; 8 Ad. & E. 846; *Paley v. Field*, 12 Ves. jun. 435; 8 R. R. 349. See other instances of rateable appropriation in *Farenc v. Bennett*, 11 East, 36; 10 R. R. 425; and *Perris v. Roberts*, 1 Vernon, 34; 2 Chan. Ca. 83; *Thompson v. Hudson*, L. R., 6 Chan. Ap. 320.

(*i*) *Fitch v. Sutton*, 5 East, 230. When a bill or note may be satisfaction, see post, Chap. XIX.

(*k*) *Welby v. Drake*, 1 C. & P. 557; 28 R. R. 787.

(*l*) *Beaumont v. Greathead*, 3 D. & L. 631; 2 C. B. 494.

(*m*) See now 3 & 4 Will. 4, c. 42, s. 3.

(*n*) *Duffield v. Creed*, 5 Esp. 52.

(*o*) *Du Beloir v. Lord Water-*

park, 1 D. & R. 16; 24 R. R. 628.

(*p*) *Egg v. Barnett*, 3 Esp. 196.

(*q*) *Aubert v. Walsh*, 4 Taunt. 293; 12 R. R. 651.

(*r*) *Pfiel v. Vanbatenberg*, 2 Camp. 439.

In America it is held that if a bill be sent to the drawee and he be directed to pass it to the credit of the holder, and do so credit it, the bill is *functus officio*, and cannot be further negotiated.

Where a promissory note that has been negotiated comes into the possession of one of the parties liable to pay it, such possession is *primâ facie* evidence of payment by him, and he is to be treated as the *bonâ fide* holder unless the contrary is made to appear.

The possession of a bill by the

The party paying a bill or note has a right to insist on its being delivered up to him (s). But, where the bill or note is not negotiable, he cannot refuse to pay it till it is delivered up (t).

CHAPTER
XVIII.

Of delivering
up the bill.

It was formerly held (u), that a party paying a debt could not in general demand a receipt for the money, and possibly still a tender, on condition of having a receipt, is insufficient (x). It has, however, been law since 43 Geo. 3, c. 126, s. 5, that a person to whom money has been paid is bound to give a receipt, and that if he refuse to fill up a blank stamp paper presented to him for that purpose, and to pay the stamp, he becomes liable to a penalty of 10*l.* (y). It is usual to write a receipt on the back of bills, and it has been said that it is the duty of bankers to make some memorandum on bills or notes which have been paid (z); and this still requires no stamp; but the exemption in favour of receipts on bills or notes is repealed (a). And a receipt on a distinct piece of unstamped paper, though it cannot be looked at as evidence of the payment, may be shown to a witness who has signed it to refresh his memory, and enable him to speak to the fact of payment (b).

Of giving a
receipt.

A receipt on the back of a bill imports, *prima facie*, that it has been paid by the acceptor (c).

A tender of part of the amount of an entire sum due on a bill or note seems not to have been good *pro tanto* (d), even though the residue were met by a set-off (e).

Tender of
part payment.

drawee after maturity is *prima facie* evidence of payment. See Byles on Bills, 6th American ed. 358.

(s) *Hansard v. Robinson*, 7 B. & C. 90; 9 Dowl. & R. 860; 31 R. R. 166; *Powell v. Roach*, 6 Esp. 76; *Alexander v. Strong*, 9 M. & W. 733; *Cornes v. Taylor*, 10 Exch. 441; Code, s. 52 (4).

(t) *Wain v. Bailey*, 10 A. & E. 616; 2 P. & D. 507.

(u) According to the older authorities, the obligor of a single bond is not bound to pay without an acquittance under seal; otherwise of a bond with condition. Bro. Ab. tit. Faits, pl. 8; 1 Vin. Ab. 192; Fortesc. 145.

(x) *Green v. Croft*, 2 H. Bl. 30; *Cole v. Blake*, 1 Peake, 238; 3 R. R. 681; post, Chap. XXVI.

(y) Stamp Act, [1891] s. 103 (2).

(z) Per Lord Ellenborough,

Burbidge v. Manners, 3 Camp. 195; 13 R. R. 786.

(a) Stamp Act. Schedule Receipt. Ex. 8. See now 58 Vict. c. 16, s. 9, ante, p. 131. A receipt may be explained. *Graves v. Key*, 3 B. & Ad. 313.

(b) *Maughan v. Hubbard*, 8 B. & C. 14; 2 Man. & R. 5; 32 R. R. 328. The present Stamp Act [1891] contains an exemption in favour of letters from bankers acknowledging the receipt of bills or notes for presentment or payment. Sched. tit. Receipt. Ex. 2.

(c) *Pfiel v. Vanbatenberg*, 2 Camp. 439; *Scholey v. Walsby*, Peake, 25; *Graves v. Key*, supra.

(d) *Cotton v. Godwin*, 7 M. & W. 147; *Hesketh v. Fawcitt*, 11 M. & W. 356; *Dixon v. Clark*, 5 C. B. 935; *Searles v. Sadgrove*, 5 E. & B. 639.

(e) *Searles v. Sadgrove*, supra.

CHAPTER
XVIII.Plea of pay-
ment.

A defendant, where payment was pleaded (but not otherwise), was allowed to reduce the damages by the amount of payment established, though he were unable to prove the plea (*f*). But if he pleaded that a note was given for a part only of the apparent consideration, and alleged payment of that part, and on issue joined the plea was found against him, the plaintiff was entitled to a verdict for the full amount of the note (*g*).

Retraction
of payments.

If the drawee discover, after payment, that the bill or cheque is a forgery, he may in general, by giving notice on the same day, or within a reasonable time, recover back the money (*h*). And if he have paid the bill with the understanding that he was to receive it back, and do not, he may bring an action to retract the payment (*i*). And an indorser may sue on a bill which he has been induced by fraud to pay on behalf of the party liable (*k*).

Payment
under mis-
take of fact
or law.

Money paid under a mistake of law cannot be recovered back (*l*); but money paid under a mistake of fact, or even in forgetfulness of a fact, may be recovered back (*m*). Payment of a bill accepted under a mistake of fact is money paid under such mistake and can be recovered back (*n*).

When pay-
ment is
deemed to be
complete.

Money laid down on the counter by a banker's cashier in payment of a cheque cannot be recovered back by action, though it were handed over under a misapprehension of the state of the drawer's account; still less can it be taken back by force from the party receiving it (*o*). A banker's

(*f*) It is said to have been doubted whether, in an action on a bill or note, a plea of part payment be good even *pro tanto*. *Lord v. Ferrand*, 13 L. J., Exch. 111. *Sed quære*.

(*g*) *Robins v. Lord Muidstone*, 4 Q. B. 811.

(*h*) In *Smith v. Mercer*, 6 Taunt. 87; 16 R. R. 576, Gibbs, C.J., expressly founded his judgment on the ground that the plaintiffs, by not giving notice in due time, had put the defendants in a worse position. *Camidge v. Allenby*, 6 B. & C. 373; 30 R. R. 358; *Smith v. Mercer*, L. R., 3 Ex. 51. But if through the delay the holders' position be altered the payment must stand. *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7; 65 L. J. 80. In *Deutsche Bank v. Bereiro*,

1 Com. Ca. 255, the plaintiffs themselves had misled the defendants, and consequently were held not entitled to recover.

(*i*) *Alexander v. Strong*, 9 M. & W. 733. See also the Chapter on ACTION.

(*k*) *Bell v. Buckley*, 11 Exch. 631.

(*l*) *Kitchen v. Hawkins*, L. R., 2 C. P. 22; *Rogers v. Ingham*, 3 Chan. D. 353. Money paid on an illegal contract partly completed cannot be recovered. *Kearley v. Thompson*, 24 Q. B. D. 742.

(*m*) *Kelly v. Solari*, 9 M. & W. 54.

(*n*) *Kendall v. Wood*, L. R., 6 Exch. 243; 39 L. J. 167.

(*o*) *Chambers v. Miller*, 32 L. J., C. P. 30; *Pollard v. Bank of England*, L. R., 6 Q. B. 623.

counter is in the nature of a neutral table, provided for the use of both banker and customer. As soon as the money is laid down by the banker upon the counter to be taken up by the receiver, the payment is complete (*p*).

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Where a bill has been protested for non-payment, any person (whether liable thereon or not) may intervene and pay it supra protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

PAYMENT
SUPRA PRO-
TEST OR FOR
HONOUR.

Any party to a bill of exchange, whether drawer, drawee, payee, referee in case of need, or any stranger with or without a previous request from the party for whose honour he pays, may intervene and pay supra protest.

Should more than one person offer to pay a bill and for the honour of different parties, that person whose payment will discharge most parties shall have the preference, *i.e.*, that person who proposes to pay for the honour of the earliest party to the bill.

Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid, are discharged, but the payer for honour becomes holder as against that party and all liable (*i.e.*, previous) to him (*q*).

Payment for honour must be attested by a notarial act appended to the protest or the extension of it, otherwise it will be a mere voluntary payment.

Requisites to
payment for
honour.

This notarial act of honour must be founded on a declaration made by the payer for honour, or his agent, setting forth his intention to pay for honour, and for whose honour he pays (*r*).

The payer for honour, on payment to the holder of the amount of the bill and the notarial charges, is entitled to receive both the bill and the protest; and should the

Rights of
payer for
honour.

(*p*) *Chambers v. Miller*, supra; unless the holder acquiesce in the retraction. *London Banking Co. v. Horsnail*, 14 T. L. R. 206; 3 Com. Ca. 105.

(*q*) Code, s. 68. He must, therefore, see that notice of dishonour is duly given to all prior parties. Though the subsequent parties are discharged, the payer for honour may rely on any title they may have. Sub-s. (5).

(*r*) Code, s. 68 (3) and (4). Hence there cannot be a pay-

ment for honour, even by a referee in case of need, without protest and the notarial declaration appended to it, and a would-be payer for honour failing to comply with these formalities would be simply in the position of indorsee of an overdue or dishonoured bill to which all defects of title affecting it at maturity attach as against him. *Mertens v. Winnington*, 1 Esp. 113; *Ex parte Wylde*, 30 L. J., Bank. 10.

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holder on demand refuse to deliver them, he will be liable to the payer for honour in damages.

The payer for honour succeeds to the title of the holder (even though no indorsement be made to him) as against the acceptor and all prior parties down to and including the party for whose honour payment was made (*s*).

Consequence
of holder
refusing.

Where the holder of a bill of exchange refuses to receive payment *supra protest*, he shall lose his right of recourse against any party who would have been discharged by such payment, *i.e.*, all parties subsequent to the one for whose honour payment was offered (*t*).

None on
promissory
notes.

As no protest is necessary in case of dishonour of a note, whether inland or foreign, there is in general no payment *supra protest* (*u*).

(*s*) Sub-s.(5); *Ex parte Wackerbath*, 5 Ves. 574; *Ex parte Swan*, L. R., 6 Eq. 344, explaining and overruling *Ex parte Lambert*, 13 Ves. 179; 9 R. R. 169. Without an indorsement to him from the holder, the payer for honour cannot indorse. Poth. Vol. IV., pt. 1, ss. 113—114; Noug. L. D. C. 584—591.

(*t*) Sect. 68 (7).

(*u*) The law merchant as to

payment *supra protest* does not apply to promissory notes. Story on Notes, s. 453. Whoever, therefore, pays a note for another without authority, express or implied, does so at his peril, but may, if the note be indorsed in blank, be a transferee for value, though with notice that the note is overdue and dishonoured; so, too, if it be indorsed to him.

CHAPTER XIX.

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AND RELEASE.

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THE Code by s. 97 preserves all the rules of the Common Law and the Law Merchant relating to contracts on bills and notes, save those inconsistent with its express provisions.

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The nature and effect of such dealings with the acceptor or other principal debtor as discharge the drawer or indorser will be discussed in the chapter on principal and surety.

Payment in due course is, as we have seen, a discharge of the bill or note ; but the rights of the holder against the acceptor or maker and other parties may be satisfied, extinguished or suspended in other ways besides payment.

A simple contract may be discharged before breach, without a release and without satisfaction (a). But after

SATISFAC-
TION.

(a) *Langden v. Stokes*, Cro. Car. 383 ; Com. Dig. Action on Case in Assumpsit, G. ; *Cousin & Holland's case*, 2 Leo. 214 ; *King v.*

Gillett, 7 M. & W. 55 ; *Dobson v. Espie*, 26 L. J., Ex. 240 ; 2 H. & N. 79.

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breach, unless there be a release, there must be satisfaction (*b*). Accord without satisfaction is no plea, and no action lies on an accord (*c*).

Its requisites.

A satisfaction must be beneficial to the plaintiff (*d*). It has been considered that it must come from the defendant, or at least from some one who represents him (*e*), but at this day probably satisfaction by a stranger would be held good (*f*).

Payment of a smaller sum by a third party.

Payment by the debtor himself of a sum smaller than the debt is no satisfaction (*g*). But payment of a smaller sum by a third person has been held to be a discharge of the whole debt. The defendant was drawer of a bill for 18*l.* 3*s.* 11*d.*, and the plaintiff had taken from the defendant's father 9*l.* in satisfaction of the whole debt. The

(*b*) A release is a formal waiver by deed under seal. But liability under any contract on a bill or note may be waived by the holder before or after maturity, and as it should seem, with or without consideration, and it has been held, even by parol, but this will not touch a holder in due course, *Foster v. Dawber*, 6 Ex. 851; and see *ante*, pp. 102, 114, and 270.

(*c*) *Allen v. Harris*, 1 Ld. Ray. 122; *Lynn v. Bruce*, 2 H. Bl. 117; 3 R. R. 381. Unless another person is party to it. *Henderson v. Stobart*, 5 Ex. 99.

(*d*) *Cumber v. Wane*, 1 Stra. 426; *Heathcote v. Crookshanks*, 2 T. R. 24.

(*e*) *Grymes v. Blofield*, Cro. Eliz. 541; *James v. Isaacs*, 12 C. B. 791; *Kemp v. Balls*, 10 Exch. 607; *Edgecombe v. Rodd*, 5 East, 294; 7 R. R. 700. The effect of satisfaction by a stranger was fully discussed in *Jones v. Broadhurst*, 9 C. B. 173; and see a very learned judgment delivered by Mr. Justice Maule in *Belshaw v. Bush*, 11 C. B. 207, to the effect that satisfaction by a stranger is good. See also Chap. XVIII. It must be fully executed. *James v. David*, 5 T. R. 141; Bac. Ab. 3; *Walker v. Seaborne*, 1 Taunt. 526. Mutual promises, with an immediate remedy on them, have, however, been considered a good accord and satis-

faction. See Com. Dig. Accord, B. 4; *Cartwright v. Cooke*, 3 B. & Ad. 701; 37 R. R. 534; *Good v. Cheeseman*, 2 B. & Ad. 328; 36 R. R. 574; but see *Bayley v. Homan*, 3 Bing. N. C. 915; 5 Scott, 94. Is not the distinction this? If the mere agreement were intended to be the satisfaction, it need not be executed; if its performance were intended as the satisfaction, it must be executed. See *Reeres v. Hearne*, 1 M. & W. 323; *Sard v. Rhodes*, 1 M. & W. 153; *Lewis v. Lyster*, 2 C., M. & R. 707. In the Roman law, a stipulation by which a former obligation was taken away by the substitution of a new one was familiar. It was called *Novatio*. It exists at this day in the French law. (Code Civil, 1271.) Novation might be either without a change of persons, *sine delegatione*, or with a change of persons, *cum delegatione*. There might be a change of the debtor's person, *expromissio*, or of the creditor's, *cessio*.

(*f*) *Belshaw v. Bush*, *ubi supra*.

(*g*) *Fitch v. Sutton*, 5 East, 230. Unless the demand be unliquidated. *Wilkinson v. Byers*, 1 Ad. & El. 106; 3 N. & M. 853; *Watters v. Smith*, 2 B. & Ad. 889; 36 R. R. 785; *Beaumont v. Greathead*, 2 C. B. 494; *Cooper v. Parker*, 24 L. J., C. P. 68; 15 C. B. 822.

plaintiff, notwithstanding, afterwards sued the defendant for the balance. But Abbott, C. J., said, "If the father did pay the smaller sum in satisfaction of this debt, it is a bar to the plaintiff's now recovering against the son, because, by suing the son, he commits a fraud on the father, whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability" (*h*). Payment of a smaller sum may be a satisfaction where that smaller sum is the result of an account stated, including cross demands (*i*).

So, although a contract by the defendant himself to pay a smaller sum can be no satisfaction, unless it be negotiable; yet a contract by a third person to do so may be (*k*). Thus the taking a bill from one of the two partners may operate as a satisfaction of the joint debt: for the sole liability of one person may, in some instances, be more advantageous than his liability jointly with another (*l*).

Engagement
by third
party.

Relinquishing a suit, involving a doubtful point of law, may be a good satisfaction (*m*). So, it should seem, is the relinquishment of a claim involving a reasonable doubt, though really unfounded and without suit (*n*).

Relinquishing
a suit.

The acceptance of a *negotiable* security from the debtor alone may be a satisfaction even of a debt of larger amount (*o*).

When a bill
operates as
satisfaction.

Where a bill or note, on which some person other than the debtor is liable, is expressly given and *accepted* (*p*), in *full satisfaction and discharge*, the liability of the debtor for the original debt will not revive, on the dishonour of the substituted instrument (*q*). But if it be taken generally on account, or in renewal, the original liability of the

(*h*) *Welby v. Drake*, 1 Car. & Payne, 557; 28 R. R. 787; *Cooper v. Parker*, 15 C. B. 822.

(*i*) *Smith v. Page*, 15 M. & W. 683; *Perry v. Atwood*, 25 L. J., Q. B. 408; 6 E. & B. 691.

(*k*) *Sibree v. Tripp*, 15 M. & W. 23; *Goddard v. O'Brien*, 9 Q. B. D. 37. *Bidder v. Bridges*, 37 Ch. D. 406; 57 L. J. 300. Where plaintiffs kept debtor's cheque for a smaller amount "on account," held not conclusive as an accord and satisfaction. *Day v. Maclea*, 22 Q. B. D. 610.

(*l*) *Thompson v. Percival*, 5 B. & Ad. 925; 3 N. & M. 667;

Henderson v. Stobart, 5 Exch. 99; and see *Belshaw v. Bush*, 11 C. B. 191.

(*m*) *Longridge v. D'Orrille*, 5 B. & Ald. 117. See *Edwards v. Baugh*, 11 M. & W. 641; *Llewellyn v. Llewellyn*, 15 L. J., Q. B. 4.

(*n*) *Cook v. Wright*, 30 L. J., Q. B. 321.

(*o*) *Sibree v. Tripp*, 15 M. & W. 23; *Beer v. Fookes*, 9 App. Ca. 605; 54 L. J. 130.

(*p*) *Hardman v. Bellhouse*, 9 M. & W. 596.

(*q*) *Sard v. Rhodes*, 1 M. & W. 153; 1 Tyrw. & Gr. 298; 4 Dowl. 743; 1 Gale, 376.

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debtor revives on its dishonour (*r*). If, in satisfaction of a note, a second note be given, and in satisfaction of the second note a third, the third note cannot be pleaded as given in satisfaction of the first (*s*).

The taking of a co-extensive security of a higher nature for a bill or note merges the remedy on the inferior instrument. But it must be strictly co-extensive. Therefore, a specialty given by one maker of a joint and *several* note does not merge the remedy on the note (*t*).

EXTINGUISH-
MENT OR
MERGER.

Effect of
warrant of
attorney.

A warrant of attorney is not an extinguishment of the debt, as between the parties. "Till judgment is entered up," says Lord Ellenborough, "the warrant of attorney is merely a collateral security, and cannot merge the original debt" (*u*).

Of transfer to
an acceptor.

A bill indorsed in blank to one of several acceptors, and in his hands *when due*, cannot be afterwards transferred (*x*), so as to confer on the transferee a remedy against any of the acceptors ; for there has been that which is an equivalent to the performance of the contract.

Of judgment.

Judgment recovered on a bill or note is an extinguishment of the original debt, as between the plaintiff and the defendant. But it alone, without actual satisfaction, is no extinguishment, as between the plaintiff and other parties not jointly liable with the original defendant, whether those parties be prior or subsequent to the defendant (*y*). Nor is it an extinguishment, as between a party prior to the plaintiff, to whom the plaintiff after the judgment returns the bill, and the defendant (*z*).

But a judgment recovered (on the joint contract) against one of several *joint* makers or *joint* acceptors, though without satisfaction, is a good defence to an action against the others (*a*). But a judgment recovered against one

(*r*) See post, *Steadman v. Gooch*, 1 Esp. 3 ; *Kearslake v. Morgan*, 5 T. R. 513.

(*s*) *David v. Preece*, 5 Q. B. 440.

(*t*) *Ansell v. Baker*, 15 Q. B. 20. *Quære*, as to the effect when the note is joint only. See *Bell v. Banks*, 3 M. & G. 258, 267 ; *King v. Hoare*, 13 M. & W. 494, 496 ; *Sharp v. Gibbs*, Scott, N. R. See ante, Chapter on ACCEPTANCE.

(*u*) *Norris v. Aylett*, 2 Camp. 329 ; *Bell v. Banks*, 3 M. & G. 258.

(*x*) *Steele v. Harmer*, 15 L. J., Exch. 217 ; 14 M. & W. 831. As to this, see the judgment of the Court of Error, 19 L. J., Exch. 37 ; 4 Exch. 1 ; Code, s. 61.

(*y*) *Bayley*, 335 ; *Claxton v. Swift*, 2 Show. 441, 494 ; *Lutwyche*, 882 ; *Skin*. 255.

(*z*) *Tarleton v. Allhusen*, 2 Ad. & E. 32.

(*a*) In *Cambefort v. Chapman*, 19 Q. B. D. 229 ; 56 L. J. 639, it was held that an unsatisfied

joint and *several* maker is no plea to an action against his companion (*b*).

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Nor does the issuing of execution against the person or goods of one party to a bill extinguish the plaintiff's remedy against other parties.

Of execution.

Nay, even the discharging of one party from execution, under a *ca. sa.*, though it is a satisfaction as to him, and a discharge of those parties to the bill who are his sureties thereon (*c*), is no extinguishment of the liability of other parties (*d*).

Of discharge from execution.

Waiving a *feri facias* against the goods of a party does not discharge any other party (*e*).

Of waiving a *feri facias*.

Taking security of a higher nature, as a deed, though it extinguish the simple contract debt on the bill, as between the parties to the substitution, has no effect on the liability of the other distinct parties to the bill (*f*), supposing that it does not give time so as to prejudice the condition of sureties. Indeed, if the specialty were given and accepted as a collateral security only, even the liability on the bill, of the party giving it, remains unaffected (*g*).

Of taking a deed.

If a bill or note be taken on account of a debt and nothing be said at the time, the legal effect of the

SUSPENSION.

judgment on a separate instrument given by one of two joint debtors for the joint debt barred an action against the other. But this case was overruled in *Wegg-Prusser v. Evans*, [1895] 1 Q. B. 108, where Lord Esher in effect says, "had the plaintiff recovered judgment against one joint contractor on the joint contract, he could not afterwards sue the other; but there is no decision that a judgment against one of two joint contractors, not on the original contract but on a separate instrument, bars an action against the other; and *Drake v. Mitchell*, 3 East, 251; 7 R. R. 449, is absolutely to the contrary effect." *Ward v. Johnson*, 15 Syng's Amer. Rep. 148; *King v. Hoare*, 13 M. & W. 494; *Brinsmead v. Harrison*, L. R., 6 C. P. 584; *Kendall*

v. Hamilton, L. R., 3 C. P. D. 403. Ord. XIII. r. 4, excepts judgment by default and execution thereon, where some of the defendants have not appeared.

(*b*) *Ibid*.

(*c*) See Chapter on PRINCIPAL AND SURETY.

(*d*) *Hayling v. Mulhall*, 2 W. Bl. 1235, the marginal note of this case is incorrect, see *English v. Darley*, 2 Bos. & P. 61; 3 Esp. 49; 5 R. R. 543; *Clark v. Clement*, 6 T. R. 525; *Mayhew v. Crickett*, 2 Swanst. 190; 19 R. R. 57. See *Michael v. Myers*, 6 M. & G. 702.

(*e*) *Pole v. Ford*, 2 Chit. 125.

(*f*) Bayley, 6th ed. 334; Bac. Ab. Extinguishment, D.; *Ansell v. Baker*, 15 Q. B. 20.

(*g*) *Bedford v. Deakin*, 2 B. & Ald. 210; 2 Stark. 178.

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XIX.

transaction is this—that the original debt still remains, but the remedy for it is suspended till maturity of the instrument in the hands of the creditor (*h*). This effect of giving the bill has also been described as a conditional payment (*i*). It is an exception, but not a solitary one, to the general rule of law, that a right of action once suspended by act of the parties is gone for ever (*k*). The action for the original debt is equally suspended if the bill or note be given by a stranger (*l*), or if it be outstanding in the hands of a transferee.

Effect of
renewal.

Where a bill is renewed, holding the original bill, and taking the substituted one, operates as a suspension of the debt till the substituted bill is at maturity (*m*). And although the second bill for the principal sum should be paid, the plaintiff may recover interest due on the original bill at the time when the second was given, by bringing an action on the original bill, unless it appear that the second bill was intended to operate as a renewal, or satisfaction of the whole of the former bill (*n*). If the second bill be discharged, by an alteration, an action may be brought on the first (*o*).

Covenant not
to sue within
limited time.

A covenant not to sue for a limited time will not suspend the right of action (*p*), but will only create a right to sue for the breach of covenant. No more will a subsequent, or

(*h*) *Kearslake v. Morgan*, 5 T. R. 513; 2 Wms. Saund. 103 b, n.c.; *Steadman v. Gooch*, 1 Esp. 3; *Davis v. Reilly*, [1898] 1 Q. B. 1; and even when the obligation is of a higher nature, it may be evidence of an agreement to suspend. *Palmer v. Bramley*, [1895] 2 Q. B. 405. If payment of a cheque be stopped, the debt instantly revives as though it had never been given. *Cohen v. Hale*, L. R., 3 Q. B. D. 371.

(*i*) *Belshaw v. Bush*, 11 C. B. 205.

(*k*) *Belshaw v. Bush*, 11 C. B. 201. See ante. *Ford v. Beech*, Parke, B., delivering the judgment of the Court of Error, 11 Q. B. 867.

(*l*) Ibid.

(*m*) *Kendrick v. Lomax*, 2 C. & J. 405; 2 Tyrw. 438. See *Ex*

parte Barclay, 7 Ves. 597; *Bishop v. Rowe*, 3 M. & Sel. 362; *Dillon v. Rimmer*, 1 Bing. 100; 7 Moore, 427; *In re London and Birmingham Bank*, 34 L. J., Chan. 418.

(*n*) *Lumley v. Musgrave*, 4 Bing. N. C. 9; 5 Scott, 230; *Lumley v. Hudson*, 4 Bing. N. C. 15; 5 Scott, 238. A renewed bill is, strictly speaking, between the same parties and for the same amount, the time of payment only being varied; but in *Barber v. Mackrell*, 68 L. T., N. S. 29, the liability of a guarantor was held to extend to one that might with more propriety be called a substituted bill for the same debt.

(*o*) *Sloman v. Cox*, 1 C., M. & R. 471; 5 Tyrw. 174.

(*p*) *Thimbleby v. Barron*, 3 M. & W. 210.

even a contemporaneous, but collateral, agreement on good consideration not to sue for a limited time on a bill or note (*q*).

CHAPTER
XIX.

An express release, *relaxatio*, is an acquittance under the seal of the releasor. Being a deed, no consideration is essential to its validity (*r*).

RELEASE.

A release by the holder after the maturity of the bill is a complete discharge as between the releasor and his transferees on the one hand, and the releasee on the other. Its effect on other parties will be considered when we come to the subject of principal and surety.

Release at maturity.

But a premature release, *i.e.*, a release before the bill is due, though good as between the parties, will not discharge the releasee from the claim of an indorsee for value, who took the bill before it was due, without notice of the release (*s*).

Premature release.

And a release, whether before or after the maturity of the bill, is good *as between the parties*, although the releasor be not at the time of the release the holder of the bill (*t*).

By a party who is not the holder.

But a release of a drawee before acceptance is inoperative (*u*).

To drawee before acceptance.

A release *by* one of several joint creditors is a release by all. And a release *to* one of several joint contractors is in law a release of all (*x*). Therefore a release of one of two joint acceptors or joint indorsers is a release to both.

By or to one of several jointly entitled or liable.

(*q*) *Ford v. Beech*, 11 Q. B. 842, in error; *Webb v. Spicer*, 19 L. J., Q. B. 35; 13 Q. B. 894, in error; *Moss v. Hall*, 5 Exch. 50; per Parke, B., *Salmon v. Webb*, 3 H. L. Cas. 510; *Flight v. Gray*, 3 C. B., N. S. 320.

(*r*) The Code, ss. 62 and 63, makes no mention of any consideration as being necessary to support either a waiver or a cancellation. See *Foster v. Dawber*, 6 Ex. 851.

(*s*) *Dod v. Edwards*, 2 C. & P. 602; Code, s. 62 (2).

(*t*) *Scott v. Lifford*, 1 Camp. 246; 9 East, 347. If an acceptor plead a release it must appear by

his plea that the bill had been accepted before the release was given. *Ashton v. Freestun*, 2 M. & G. 1; 2 Scott, N. R. 273. The holder only can waive. Code, s. 62. *Quære* whether there can be a waiver by estoppel?

(*u*) *Drage v. Netter*, 1 Ld. Raym. 65; *Hartley v. Manton*, 5 Q. B. 247; and see *Ashton v. Freestun*, *supra*.

(*x*) Co. Litt. 232 a; *Nicholson v. Revill*, 4 Ad. & Ell. 675; 6 N. & M. 192; 1 Har. & W. 753. So a release of one of several joint trespassers is a release of all. Lit. s. 376.

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A release of one of several joint debtors, who are *severally*, as well as *jointly*, liable, is equally a release to all, for judgment and execution against one would have been a discharge to all (*y*).

But it has been held, that a release to parties jointly liable may in some cases be restrained by the terms of the instrument (*z*), and may be construed as a covenant not to sue where such a construction is necessary to carry out the paramount intention of the deed (*a*). But it cannot be defeated by a mere parol agreement (*b*).

Restrained by
a recital.

Indeed, the most general and sweeping words of release may be qualified and restrained by the recital (*c*).

Covenant not
to sue.

A covenant not to sue amounts in law to a release (*d*). But though it may be pleaded as a release by the party to whom it is given, it does not so far operate as to discharge another person jointly liable (*e*). Nor will a covenant not to sue, given by one of two joint creditors, operate as a release (*f*).

Covenant not
to sue for a
limited time.

A covenant not to sue for a limited time, though (as we shall hereafter see) it discharges sureties, does not, *as between the parties*, effect a release, or even a suspension of the action (*g*), unless there be a provision that it may be pleaded in bar (*h*).

Appointment
of debtor
executor.

We have already seen that the creditor's appointment of his debtor as executor amounted in law (*i*) to a release ;

(*y*) *Nicholson v. Revill*, 4 Ad. & E. 675 ; 6 N. & M. 192 ; 1 Har. & W. 753 ; *Evans v. Therridge*, 2 K. & J. 174 ; 25 L. J., Chan. 102.

(*z*) *Brooks v. Stuart*, 1 Per. & D. 615 ; 9 Ad. & E. 854 ; *Cocks v. Nash*, 9 Bing. 341 ; 35 R. R. 547 ; *Price v. Barker*, 4 E. & B. 760 ; *Henderson v. Stobart*, 5 Exch. 99.

(*a*) *Solly v. Forbes*, 2 B. & B. 38 ; 22 R. R. 641 ; *Willis v. De Castro*, 27 L. J., C. P. 243 ; 4 C. B. (N.S.) 216.

(*b*) 2 Rol. Ab. 412 ; *Lacy v. Kynaston*, 2 Salk. 575 ; 2 Saund. 47, *t* ; *Cheetham v. Ward*, 1 B. & P. 630 ; 4 R. R. 741 ; *Nicholson v. Revill*, ubi supra, note (*y*) ; *Brooks v. Stuart*, 9 Ad. & E. 854 ;

1 Per. & D. 615.

(*c*) *Payler v. Homersham*, 4 M. & S. 423 ; 16 R. R. 516 ; *Simons v. Johnson*, 3 B. & Ad. 175 ; 37 R. R. 377.

(*d*) Com Dig. tit. Release. See as to a covenant in a composition deed, *Ellis v. M'Henry*, L. R., 6 C. P. 229.

(*e*) *Dean v. Newhall*, 8 T. R. 168 ; *Hutton v. Eyre*, 6 Taunt. 289 ; 16 R. R. 619 ; *Price v. Barker*, 4 E. & B. 760.

(*f*) *Walmesley v. Cooper*, 11 Ad. & Ell. 216 ; 3 Per. & Dav. 149.

(*g*) *Thimbleby v. Barron*, 3 M. & W. 210.

(*h*) *Walker v. Neville*, 34 L. J., Exch. 73.

(*i*) But not in equity. See ante, p. 64.

and that the same consequence follows if one of several joint debtors be appointed executor. But a debtor's appointment of his creditor to be executor is no release unless there be assets (*k*).

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The release of a debt is a release of the right to hold any securities that may have been given for the debt (*l*).

Right to hold
securities for
released debt.

(*k*) See *Lowe v. Peskett*, 16
C. B. 503.

(*l*) *Cowper v. Green*, 7 M. & W.
633.

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CHAPTER XX.
General prin-
ciples of the
law.

OUR law of principal and surety is in substance the same as the Roman law ; not, perhaps, so much derived from it, as flowing from the same natural equities between creditor, principal debtor, and sureties. “Pro eo qui promittit solent alii obligari, qui fidejussores appellantur ; quos homines accipere solent dum curant ut diligentius sibi cautum sit ” (a).

(a) Inst. 3, 20. See as to the Roman -Dutch law, and the old French law, *M'Donald v. Bell*, 3 Moo. P. C. C. 315 ; *Bellingham v. Frere*, 1 Moo. P. C. C. 333. All the rules of the common law and the law merchant not inconsistent with the Code are preserved by sect. 97.

A party liable on a bill sometimes bears to the holder the relation of principal debtor, sometimes of surety only.

The contract of suretyship is a contract *uberrimæ fidei*. Therefore, where there is any misrepresentation, or any fraudulent concealment of any material fact, which fact if known might have induced the surety not to enter into the contract, that contract is void from the beginning as between the creditor and the surety (*b*). But mere non-disclosure of the state of accounts by the creditor to the surety will not avoid the contract (*c*).

It is a general rule of law, that a discharge of the principal is a discharge to the surety. For the engagement of the surety, being but an accessory to the principal's agreement (*d*), terminates with it. If, notwithstanding this release of the principal debtor, the creditor could sue the surety, he would evade the effect of his own discharge to the principal, and regain a debt which he may have relinquished for a valuable consideration, or at least by his deliberate act. Besides, were the surety obliged to pay the creditor, the surety must either be allowed to resort to his principal, or he must not. If he may, then the principal will lose the benefit of that discharge which he received from the creditor; if he may not, the loss occasioned by the creditor's stipulation with the principal will fall on the surety. Further, it is a doctrine of equity that the surety is entitled to all the remedies which the creditor has against the principal, and the creditor by releasing the principal would prejudice those remedies. It is evident from these considerations, that the only rational and equitable rule is, that which is well established both in law and equity, namely that a discharge to the principal is a discharge to the surety.

In inquiring into the effect of a discharge or indulgence by the holder, to parties liable on a negotiable instrument, let us consider,—1st. What parties to a bill or note are principals, and what parties are sureties; 2ndly. What conduct of the holder will discharge the surety; 3rdly. How

Division of
subject.

(*b*) See *Owen v. Homan*, 4 H. of L. Cas. 997; *Hamilton v. Watson*, 12 C. & F. 109; *North British Insurance Company v. Lloyd*, 10 Exch. 523.

(*c*) *Hamilton v. Watson*; *North British Insurance Company v. Lloyd*, *supra*. But see *Railton v. Matthews*, 10 C. & F. 934, and

B.B.E.

the observations of Parke and Alderson, BB., thereon in *North British Insurance Company v. Lloyd*.

(*d*) Nam fidejussorum obligatio accessio est principalis obligationis, nec plus in accessione potest esse, quam in principali re. Instit. 3, 20, 5.

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the discharge of the surety may be prevented; 4thly. How it may be waived; 5thly. What conduct of the creditor to the surety will discharge the principal debtor; and, lastly, add a few words on the rights of sureties.

WHAT
PARTIES TO A
BILL ARE
PRINCIPALS,
AND WHAT
PARTIES ARE
SURETIES.

First. What parties to a bill are principals, and what parties are sureties.

Suppose the bill to have been accepted and indorsed for value. The acceptor is the principal debtor, and all the other parties are sureties for him, liable only on his default.

But though all the other parties are, *in respect of the acceptor*, sureties only, they are not, *as between themselves*, merely co-sureties, but each prior party is a principal in respect of each subsequent party. For example, suppose a bill to have been accepted by the drawee, and afterwards indorsed by the drawer and by two subsequent indorsers to the holder. As between the holder and the acceptor, the acceptor is the principal debtor, and the drawer and indorsers are his sureties. But as between the holder and the drawer, the drawer is a principal debtor, and the subsequent indorsers are his sureties. As between the holder and the second indorser, the second indorser is the principal, and the subsequent or third indorser is his surety. A discharge, therefore, to the prior parties, the principals, is a discharge to the subsequent parties, the sureties; but a discharge to the subsequent parties, the sureties, is not a discharge to the prior parties, the principals (*e*).

Where a bill is payable to the order of a third person, the payee is a subsequent party, and so a surety for the drawer. He stands in the same situation as the first indorsee and second indorser of a bill drawn payable to the indorser's order (*f*).

It follows, therefore, that a discharge to the acceptor is a discharge to all the parties to the bill; for, if they were still liable, they could either sue the acceptor, or they could not. If they could, the discharge to the acceptor would be frustrated; if they could not, they must pay the bill without a remedy over, which would extend their liability beyond their contract. So, a discharge to an

(*e*) Where a bill of exchange is drawn by one person upon another, and a third party subscribes his name under that of the drawer, adding the word "surety" to his signature, it has been held in America, that the undertaking of such third party

is with the payee or subsequent holder, that the bill shall be accepted and paid, but he incurs no obligation to the drawees. See Byles on Bills, 6th American ed. 374.

(*f*) *Claridge v. Dalton*, 4 M. & Sel. 226; 16 R. R. 440.

indorser is no discharge of the prior indorsers, for they have no remedy against the discharged indorser; but it is a discharge of the subsequent indorsers, for if the holder could notwithstanding recover against them, and they could recover against the prior discharged indorser, his discharge would be frustrated; if they could not, they must pay the bill without a remedy over (*g*).

It was formerly held, that where a bill was accepted without consideration for the accommodation of the drawer, the drawer was to be considered the principal debtor, and the acceptor as his surety; and, therefore, that time given to the drawer would discharge the acceptor (*h*), but time given to the acceptor would not discharge the drawer (*i*). But this distinction has since been overruled at law (*k*), the acceptor, in all cases of accommodation bills as well as others, being considered as the principal debtor, though the holder, at the time of making the agreement, or even of taking the bill, knew the acceptance to have been without value (*l*). It was otherwise in equity where the holder had notice, and the equitable doctrine was available under an equitable plea (*m*).

On accommodation bills.

As the acceptor is at law in all cases the principal debtor on a bill, so the maker is at law the principal debtor on a

On promissory notes.

(*g*) *Smith v. Knox*, 3 Esp. 46; *Claridge v. Dalton*, 4 M. & Sel. 232; 16 R. R. 440; *Hall v. Cole*, 6 Nev. & M. 124; 4 Ad. & El. 577; 1 Har. & W. 722.

(*h*) *Laxton v. Peat*, 2 Camp. 185; see *Yallop v. Ebers*, 1 B. & Ad. 698.

(*i*) *Collott v. Haigh*, 3 Camp. 281.

(*k*) *Fentum v. Pocock*, 5 Taunt. 192; 1 Marsh. 14; *Curstairs v. Rolleston*, 5 Taunt. 551; 1 Marsh. 207; *Smith v. Jones*, 2 E. & B. 50, note. Now see Code, s. 28 (2).

(*l*) "I think," says Parke, J., "that the decision in *Fentum v. Pocock* was good sense and good law." *Price v. Edmunds*, 10 B. & C. 578; *Harrison v. Courtauld*, 3 B. & Ad. 36; *Nichols v. Norris*, 3 B. & Ad. 41. The doctrine laid down in *Fentum v. Pocock* has, however, been doubted in equity by Lord Eldon. *Ex parte Glendin-*

ning, Buck. 517; *Bank of Ireland v. Beresford*, 6 Dow. 233; 19 R. R. 50; and by a late Master of the Rolls, Sir John Leach. As to the rule in equity, see, however, *Hollier v. Eyre*, 9 Clark & F. 45; *Strong v. Foster*, 17 C. B. 201; *Daries v. Stainbank*, 6 De G., Mac. & G. 679. An accommodation acceptor who pays the creditor is, it seems, entitled to all instruments and securities given by the principal debtor. *Dowbiggin v. Bourne*, You. 115; *Wodehouse v. Farebrother*, 25 L. J., Q. B. 22; 5 E. & B. 277; and see now the statutory rule, 19 & 20 Vict. c. 97, s. 5; *Pearl v. Deacon*, 24 Beav. 186; 1 De G. & J. 461; 26 L. J., Chan. 761. A holder for value may recover from an accommodating party, even with notice of the fact. Code, s. 28 (2).

(*m*) *Bailey v. Edwards*, 34 L. J., Q. B. 41; 4 B. & S. 761.

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note, though it be given by the maker to the payee without consideration (*n*), and the holder take it with notice of the absence of consideration (*o*).

The indorsers of a note severally stand, as principals or sureties, in the same situation as the indorsers of a bill.

On a joint and several note.

When of a joint and several note one maker is in reality principal and the other surety, yet it was no defence *at law* that one is principal and the other is surety, that this was known to the creditor at the time of the contract, and, consequently, that the surety is discharged by time given to the principal (*p*). But such a defence was plainly available in equity (*q*), and therefore might be the ground of an equitable plea.

(*n*) *Curstairs v. Rolleston*, 5 Taunt. 551; 1 Marsh. 207.

(*o*) *Nichols v. Norris*, 3 B. & Ad. 41.

(*p*) *Price v. Edmunds*, 10 B. & C. 578; *Perfect v. Musgrave*, 6 Price, 111; *Manley v. Boycott*, 2 E. & B. 46; *Strong v. Foster*, 17 C. B. 201; *Hollier v. Eyre*, 9 Clark & F. 45. But evidence to that effect has been admitted. *Garrett v. Jull*, 1 S. N. P. 11th ed. 407; *Hall v. Willcor*, 1 M. & Rob. 58. In *Clarke v. Wilson*, 3 M. & W. 208, it was intended to have raised the question, but on demurrer to defendant's plea judgment was given for the plaintiff. In *Rees v. Berrington*, 2 Ves. jun. 540; 3 R. R. 3, Lord Loughborough says, referring to legal obligations, "that where two are bound jointly and severally, the surety cannot aver by pleading that he is bound as surety." See *Ashbec v. Pidduck*, 1 M. & W. 564; and *Thompson v. Clubley*, 1 M. & W. 212. But, in equity, a surety may aver and prove that he was only a surety, though the bond was joint and several. *Heath v. Key*, 1 Y. & J. 434; *Nisbett v. Smith*, 2 Bro. C. C. 581; *Skip v. Hucy*, 3 Atk. 91. The authorities are contradictory; but, on principle, such evidence is inadmissible at law as against the creditor; for it is parol evidence to make

a written contract conditional, which, on the face of it, is absolute. The evidence does not show absence of consideration as in the case of an accommodation acceptance. Besides, the introduction of such evidence might affect an innocent indorsee with stipulations of which he had no notice. But when the question arises not between the creditor and his debtors, but between those debtors themselves, whether one was principal and the other was surety, parol evidence is admissible at law, as in such a case it clearly is in equity. *Craythorne v. Swinburne*, 14 Ves. 170; 9 R. R. 264; see ante, p. 9; *Reynolds v. Wheeler*, 30 L. J., C. P. 350.

(*q*) *Hollier v. Eyre*, 9 C. & F. 45; *Davies v. Stainbank*, 6 De G., Mac. & G. 679. See, however, *Strong v. Foster*, supra. But this case was reflected on in *Pooley v. Harradine*, 7 E. & B. 431; and see *Mutual Loan Fund v. Sudlow*, 28 L. J., C. P. 108; *Rayner v. Fussey*, 28 L. J., Exch. 132; *Taylor v. Burgess*, 29 L. J., Exch. 7; 5 H. & N. 1; and may be considered to have been finally overruled by the Court of Exchequer Chamber in *Greenough v. M'Clelland*, 30 L. J., Q. B. 15; *Oriental Finance Company v. Overend, Gurney & Co.*, L. R., 7 H. L. 348.

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Secondly, as to what conduct of the creditor will discharge the surety.

The creditor must not, as we have already seen, conceal from the surety any stipulation in the original contract, disadvantageous to the principal debtor. Such concealment is a fraud, and releases the surety (*r*).

And the surety is discharged if the actual original contract between the creditor and the principal debtor varies in the slightest degree from that for which the surety had stipulated (*s*).

So, in all transactions subsequent to the original contract, the surety's remedies both at law and in equity, against the principal debtor, whether in his own name or in the name of the creditor, must be preserved intact by the creditor (*t*).

The holder of a bill of exchange is not obliged to use active diligence in order to recover against the acceptor (*u*), in the absence of any agreement to do so. He may defer suing him as long as he pleases ; he may even promise not to press him, or not to sue him, if the promise be not binding in law. Thus, where the executrix of an acceptor verbally promised to pay the holder out of her own estate, provided he would forbear to sue, and he forbore accordingly, it was held that, the agreement being invalid under the Statute of Frauds, the drawer was not discharged (*x*).

But, if the holder once destroy or suspend, or, by a binding agreement with the acceptor (*y*), contract to destroy or suspend, his right of action against the acceptor, the drawer and indorsers are at once discharged, unless the

WHAT CON-
DUCT OF THE
CREDITOR
DOES OR
DOES NOT
DISCHARGE
THE SURETY.

(*r*) *Pidcock v. Bishop*, 3 B. & C. 605 ; 5 D. & R. 505 ; 27 R. R. 430 ; *Mayhew v. Crickett*, 2 Swan. 193 ; 19 R. R. 57 ; *Stone v. Compton*, 5 Bing. N. C. 142 ; 6 Scott, 816 ; *Jackson v. Duchaire*, 3 T. R. 551 ; *Cecil v. Plaistow*, 1 Anst. 202 ; *Middleton v. Lord Onslow*, 1 P. Wms. 768 ; *Brown v. Wilkinson*, 13 M. & W. 14.

(*s*) See *Bonsor v. Cox*, 4 Beav. 379 ; affirmed on appeal, 4 Beav. 383 ; 6 Beav. 110—118 ; *Polak v. Everett*, L. R., 1 Q. B. D. 669 ; *Croydon Gas Co. v. Dickenson*, L. R., 2 C. P. D. 46.

(*t*) And see as to the duty of the creditor, *Watts v. Shuttleworth*, 5 H. & N. 235 ; affirmed on appeal, 7 H. & N. 353 ; *Wulff v. Jay*, L. R., 7 Q. B. 756 ; 41

L. J. 322 ; *Rainbow v. Juggins*, L. R., 5 Q. B. D. 138.

(*u*) *Orme v. Young*, Holt, N. P. 84 ; 17 R. R. 611 ; *Eyre v. Everest*, 2 Russ. 381 ; 3 Mer. 278 ; *Trent Navigation v. Harley*, 10 East, 34. Unless there be a stipulation that the creditor is on default to sue the debtor without delay. *Bank of Ireland v. Beresford*, 6 Dow. 233 ; 19 R. R. 50.

(*x*) *Philpot v. Briant*, 4 Bing. 717 ; 1 M. & P. 754 ; 3 C. & P. 244 ; 29 R. R. 710.

(*y*) *Fraser v. Jordan*, 26 L. J., N. S., Q. B. 288 ; 8 E. & B. 303. But an agreement with a *stranger* will not have this effect. *Ibid.* See, however, *Lyon v. Holt*, 5 M. & W. 250.

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agreement giving time contain a stipulation that the holder shall, in case of default, have *judgment* at a period as early as he could have obtained judgment if hostile proceedings had continued (*z*). But if the agreement contain a stipulation that a judgment shall be given, it is not necessary to aver in a plea disclosing such an agreement that the time within which the plaintiff might have obtained judgment was postponed (*a*). That it was not must either be specially replied, or may possibly (if the form of the averment in the plea admits of it) be proved under a traverse of an actual forbearance (*b*).

If the creditor engages with the surety that he will enforce payment from the principal debtor within a certain time, his neglect to do so is a good defence in equity (*c*).

Receipt of
payment.

Payment by the principal of course discharges the surety.

Payment of money, which has to be refunded as being a fraudulent preference, is no payment so as to discharge a surety (*d*).

The acceptor of a bill, or maker of a note, is bound to pay on the day the bill or note falls due, and therefore he cannot plead in his own discharge a subsequent tender (*e*). But it has been held that an indorser has a reasonable time within which to pay the bill; and if he pay, or tender payment, within a reasonable time, and before writ issued, perhaps he discharges himself (*f*). And, therefore, payment by the acceptor or maker, though after the note has been dishonoured, if within a reasonable time, and with interest, and before action brought against the indorser, or a tender of such payment, though it would not discharge himself, would, it should seem, discharge the indorser.

Release.

A release to the acceptor or maker discharges the indorsers; and a release of one of several joint acceptors or makers is

(*z*) *Kennard v. Knott*, 4 M. & Gr. 474; *Michael v. Myers*, 6 M. & Gr. 702. Receipt of interest in advance is not necessarily a giving of time. *Rayner v. Fussey*, 28 L. J., Exch. 132.

(*a*) *Kennard v. Knott*, 4 M. & Gr. 474; *Isaac v. Daniel*, 15 L. J., Q. B. 149; 8 Q. B. 500; *Moss v. Hall*, 5 Exch. 46.

(*b*) In some of the American States due diligence is required. See the authorities in Byles on Bills, 6th American ed. p. 379.

(*c*) *Lawrenoe v. Walmsley*, 31

L. J., C. P. 143; *Watson v. Alcock*, 22 L. J., Chan. 858; 4 De G., Mac. & G. 242.

(*d*) *Pritchard v. Hitchcock*, 6 M. & G. 151; *Petty v. Cooke*, L. R., 6 Q. B. 790.

(*e*) *Hume v. Peploe*, 8 East, 168; 9 R. R. 399.

(*f*) *Walker v. Barnes*, 5 Taunt. 240; 1 Marsh. 36; 15 R. R. 655; *Soward v. Palmer*, 2 Mood. 274; 8 Taunt. 277; 19 R. R. 515; but see *Siggers v. Lewis*, 1 C., M. & R. 370; 4 Tyr. 847; 2 Dowl. 681.

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a release of all. But if it appear on the face of the deed that it was the paramount intention of the parties that the others should be held liable, this intention will be carried into effect by disregarding the form of the deed and construing the release as a covenant not to sue (*g*).

But a general covenant not to sue discharges the sureties, for that will enure as a release (*h*); or a covenant not to sue within a particular time (*i*), though it do not in law amount to a release, or suspend the action (*k*).

Covenant not to sue.

So also will a release in law. Therefore, if the holder made the acceptor his executor, the indorsers were discharged at law, though it might be otherwise in equity.

Release in law.

A written or verbal agreement, on good consideration (*l*), not to sue the acceptor at all, or not to sue him within a specified time, discharges the drawer and indorsers (*m*); but if such agreement be without consideration, or not made with the principal or otherwise void, the indorsers are not discharged (*n*). Giving time to an apparent surety,

Agreement not to sue.

(*g*) *Solly v. Forbes*, 2 Bro. & Bing. 38; 22 R. R. 641; *Henderson v. Stobart*, 5 Exch. 99; *Price v. Barker*, 4 E. & B. 760; *Bateson v. Gosling*, L. R., 7 C. P. 9; 41 L. J., C. P. 53.

(*h*) Com. Dig. Release.

(*i*) At law, a parol agreement by the creditor not to sue the principal is no discharge to the surety of a liability he has contracted by deed. *Davey v. Prendergrass*, 5 B. & Al. 187, recognized in *Price v. Edmunds*, 10 B. & C. 582; *Bulteel v. Jarrold*, 8 Price, 467; *Cocks v. Nash*, 9 Bing. 346; 2 M. & Sc. 434; 35 R. R. 547; see vide *Archer v. Hale*, 4 Bing. 464; 1 M. & P. 285. But, in equity, the creditor's giving time to the principal, although by a parol agreement, is a discharge to the surety of a liability created by deed. *Rees v. Berrington*, 2 Ves. jun. 540; 3 R. R. 3; *Bulteel v. Jarrold*, 8 Price, 467; et vide *Combe v. Woolf*, 8 Bing. 161; 1 M. & Sc. 241; 34 R. R. 659; *Bowmaker v. Moore*, 3 Price, 214; 7 Price, 228; 21 R. R. 758; *Blake v. White*, 1 Y. & C. Exch. Ca. 420. As to circumstances under

which a Court of equity would interfere, see *Heath v. Key*, 1 Y. & J. 434. But a covenant not to sue upon a simple contract for a limited time, is not pleadable in bar to an action on the contract against the principal debtor. *Thimbleby v. Barron*, 3 M. & W. 210.

(*k*) *Quære*, as to the effect of indulgence as to part of the sum due. See *Mayhew v. Crickett*, 2 Swanst. 189; 19 R. R. 57.

(*l*) The Court will not estimate the value of the consideration. That would be to inquire whether the bargain were a good one or not. *Moss v. Hall*, 5 Exch. 50.

(*m*) Ibid.

(*n*) *Arundel Bank v. Goble*, K. B. 1817; Chitty, 9th ed. 413; 2 Chit. 335; *Willison v. Whitaker*, 2 Marsh. 383; 7 Taunt. 53; *Brickwood v. Annis*, 5 Taunt. 614; 1 Marsh. 250; *Philpot v. Briant*, 4 Bing. 717; 1 Moo. & P. 754; 3 C. & P. 244; 29 R. R. 710; *Clark v. Birley*, 41 Ch. D. 422. See the American authorities in Byles on Bills, 6th American ed. p. 381.

- CHAPTER XX. who is really the principal, will discharge the acceptor, who, though apparently the principal, is only the surety to the knowledge of the creditor (*o*).
- Renewing a bill. The taking of a new bill from the acceptor, payable at a future day, discharges the indorsers (*p*).
- Misappropriation of securities. Misappropriating or misusing, or losing any security for the debt held by the creditor, discharges the surety (*q*).
- Inability to recover. Where the creditor was unable to recover against the principal debtor on account of a set-off existing between them, an equitable plea stating these facts was held to be a good defence in an action against the surety (*r*).
- Discharging from execution. Discharging the acceptor or a prior indorser from execution against the person, discharged the other indorsers ; but discharging a subsequent indorser from execution afforded no defence to a prior indorser (*s*). A second execution against the person of the same debtor who had been once discharged was not absolutely void, and therefore a man might be taken again if he had so agreed (*t*). And it is conceived that where the holder of a bill has seized the acceptor's goods in execution, he is in the position of a creditor holding the security of a principal debtor, and may so conduct himself as to discharge the sureties (*u*).
- (*o*) *Oriental Finance Co. v. Orerend, Gurney & Co.*, L. R., 7 Chan. Ap. 142 ; L. R., 7 H. of L. 348. But as the Code by s. 28 makes accommodating parties liable on the instrument to a holder for value, whether he had notice or not, and presumably in their respective characters thereon, it seems that the accommodating acceptor must be the principal debtor *on the bill*.
- (*p*) *Gould v. Robson*, 8 East, 576 ; 9 R. R. 498 ; *English v. Darley*, 2 B. & P. 62 ; 3 Esp. 49 ; 5 R. R. 543.
- (*q*) *Pearl v. Deacon*, 24 Beav. 186 ; 1 De G. & J. 461 ; 26 L. J., Ch. 761 ; *Wulff v. Jay*, L. R., 7 Q. B. 756 ; 41 L. J. 322.
- (*r*) *Becherraise v. Lewis*, L. R. 7 C. P. 372 ; 41 L. J. 161.
- (*s*) *Hayling v. Mulhall*, 2 W. Bla. 1235. In the marginal note of this case, the words "prior" and "subsequent" are transposed. See *English v. Darley*, 2 B. & P. 62 ; 3 Esp. 49 ; 5 R. R. 543.
- (*t*) *Atkinson v. Bayntun*, 1 Bing. N. C. 444 ; 1 Scott, 404.
- (*u*) "It is," says Lord Eldon, "a question fit to be tried at law, whether, if a party takes out execution on a bill of exchange, and afterwards waives that execution, he has not discharged those who were sureties for the due payment of the bill. The principle is, that he is a trustee of his execution for all parties interested in the bill." *Mayhew v. Crickett*, 2 Swanst. 190 ; 19 R. R. 57, and see *Smith v. Winter*, 4 M. & W. 467 ; *Lake v. Brutton*, 25 L. J., Ch. 842.
- But it has been decided that the withdrawing of an execution against the goods of an acceptor will not discharge the drawer, against whom judgment had been

Part payment by the principal or by the surety will only discharge the surety (*x*) *pro tanto*.

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XX.

A mere offer to give time to the acceptor not acted upon will not discharge the drawer (*y*).

Part pay-
ment.

Offer to give
time.

The taking a cognovit (or as it now is, judgment by consent) or warrant of attorney or judge's order from the acceptor, though payable by instalments, will not discharge the indorsers, provided the last instalment be not postponed beyond the period when, in the ordinary course of the action, judgment and execution might have been had (*z*). But the instrument must be executed with the statutory formalities (*a*).

Cognovit,
warrant of
attorney, or
judge's order.

The obtaining of a judgment against any one party, without satisfaction, is no discharge of any other party (*b*).

Judgment.

If the acceptor become bankrupt, the holder may prove and receive a dividend without prejudice to his remedies against other parties, for the acceptor is, in case of bankruptcy, discharged, not by the act of the holder, but by act of law (*c*).

Bankruptcy.

obtained, and that the rule, that giving indulgence to an acceptor without the consent of the drawer discharges such drawer, does not apply after judgment. *Pole v. Ford*, 2 Chit. 126; *Bray v. Manson*, 8 M. & W. 668; but see *English v. Darley*, 2 B. & P. 62; 3 Esp. 49; 5 R. R. 543. It is conceived that when the obligation of a surety is pursued to judgment, he is, *at law*, no longer surety, but an absolute debtor, yet that equity, regarding the substance and not the form of his obligation, may consider him still a surety, entitled to all the securities which the creditor holds, and perhaps discharged by indulgence to the principal. *Duncan, Fox & Co. v. N. S. Wales Bank*, 6 App. Ca. 1. But a decree in equity against his surety prevents the subsequent giving of time from discharging the surety. *Jenkins v. Robert-*

son, 23 L. J., Ch. 816; 2 Drew. 351.

(*x*) *Wulwyn v. St. Quentin*, 1 B. & P. 652; 2 Esp. 515.

(*y*) *Hewet v. Goodrick*, 2 C. & P. 468; *Badnall v. Samuel*, 3 Price, 521.

(*z*) *Jay v. Warren*, 1 C. & P. 532; and see *Lee v. Lerey*, 6 Dowl. & R. 475; 4 B. & C. 390; 1 C. & P. 553; *Hulme v. Coles*, 2 Sim. 12; 29 R. R. 52; *Sterenson v. Roche*, 9 B. & C. 707; *Price v. Edmunds*, 10 B. & C. 578; *Kenward v. Knott*, 4 M. & G. 474; *Whitfield v. Hodges*, 1 M. & W. 679.

(*a*) *Watson v. Alcock*, 1 Sm. & G. 319; 4 De Gex, M. & G. 242.

(*b*) *Claxton v. Swift*, 2 Show. 441, 494; 1 Lutw. 878; Ord. XIII. r. 4.

(*c*) *Brown v. Carr*, 5 Russ. 600; 7 Bing. 508; *Langdale v. Parry*, 2 D. & R. 337.

CHAPTER
XX.Liquidation
and com-
pounding.

It is now decided, both at law and in equity, that whether a debtor be released by bankruptcy, liquidation, or involuntary composition, he is discharged by operation of law, and his co-debtor or surety still remains liable (*d*), and the law was the same under the old insolvent acts (*e*).

Collateral
security.

Though the taking of a fresh bill from the acceptor in lieu of the dishonoured bill discharges the other parties, it will not have the effect, if the second bill or second security, whatever it be, were given as a collateral security (*f*). Where a bill having been dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first, and the payee discounted the second bill and indorsed the first to the plaintiff; it was held, that the second bill was merely a collateral security, and that the receipt of it by the payee did not amount to giving time to the acceptor of the first bill, so as to exonerate the drawer. "In cases of this description," says Abbott, C.J., "the rule laid down is, that if time be given to the acceptor, the other parties to the bill are discharged; but in no case has it been said, that taking a collateral security from the acceptor shall have that effect. Here the second bill was nothing more than a collateral security" (*g*). B., being indebted to A., procured C. to join with him in giving a joint and several

(*d*) *Megrath v. Gray*, L. R., 9 C. P. 216; 43 L. J. 63; *Ex parte Jacobs*, L. R., 10 Ch. Ap. 211; *Ellis v. Wilmot*, L. R., 10 Ex. 10; *Simpson v. Henning*, L. R., 10 Q. B. 406; 44 L. J. 143; Bankruptcy Act, 1890, s. 3(19). Where a joint and several note had been given by partners, who subsequently became bankrupt, it was held that acceptance of a composition on the joint debt was no discharge of the separate debt. This rule, however, seems not to apply, if the separate debts are discharged in bankruptcy or liquidation. *Ex parte Hammond*, L. R., 16 Eq. 614. If the holder voluntarily accepted a composition, the indorsers were discharged. *Ex parte Wilson*, 11 Ves. 412; 8 R. R. 194; *Ex parte Smith*, Co. B. L. 189; *Ellison v. Dezell*, 1 S. N. P. 11th ed. 385.

(*e*) *Nadin v. Battie*, 5 East, 147;

1 Smith, 362; and see *English v. Darley*, 2 B. & P. 62; 3 Esp. 49; 5 R. R. 543. If a creditor executed a deed of composition, having indorsed away bills on the debtor, the deed was no defence to an action on the bills when they were returned to the creditor. *Margetson v. Aitken*, 3 C. & P. 338; Dans. & Ll. 157. Where a man has been discharged from a debt on a note under the Insolvent Act, a new note for the old debt would not bind, though given to procure time for a surety on the old note. *Erans v. Williams*, 1 C. & M. 30; 3 Tyr. 226.

(*f*) *Gordon v. Calvert*, 4 Russ. 581; 28 R. R. 175; *Calvert v. Gordon*, 7 B. & C. 809.

(*g*) *Pring v. Clarkson*, 1 B. & C. 14; 2 Dowl. & R. 78. See the observations on this case. Bayley, 6th ed. 347.

promissory note for the amount, and afterwards having become further indebted and being pressed by A. for further security by deed reciting the debt, and that for a part a note had been given by him and C., and that A. having demanded payment for the debt, B. had requested him to accept a further security, assigned to A. all his household goods, &c., as a *further* security, it was held, that this did not affect the remedy on the note against C. (*h*). So, where one of the three partners, after a dissolution of partnership, undertook by deed made between the partners to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills, the separate notes having proved unproductive, it was held, that he might still resort to his remedy against the other partners, and that the taking, under these circumstances, the separate notes, and even afterwards renewing them several times, did not amount to satisfaction of the joint debt (*i*).

A warrant of attorney may be only a collateral security (*k*). Warrant of attorney.

Though the drawee should not have accepted the bill, yet it is conceived that the holder, by giving up the bill to him and taking from him a substituted bill at a longer date, would discharge the prior parties, though he have given due notice of dishonour. It is true the drawee is not the principal debtor, nor at law a debtor to the holder at all, but he is the debtor of the drawer; and, if a man be referred to his own debtor's debtor for payment, and instead of taking cash elects to take a bill, he discharges his own debtor (*l*). If, however, the holder, being unable to obtain cash, take a bill from the drawee as a collateral security, and keep the original bill, his remedies on the original bill would not be affected, and as between himself and the drawee there would be a good consideration for the new bill (*m*).

Discharge of prior parties by giving time to drawee who has not accepted.

(*h*) *Ticopenny v. Young*, 3 B. & C. 208; 5 Dowl. & R. 259.

(*i*) *Bedford v. Deakin*, 2 B. & Al. 210; 2 Stark. 178.

(*k*) *Norris v. Aylett*, 2 Camp. 329; *Bell v. Banks*, 3 M. & G. 258.

(*l*) *Strong v. Hart*, 9 D. & R.

189; 6 B. & C. 160; 30 R. R. 272; *Smith v. Ferrand*, 7 B. & C. 19; 9 D. & R. 803; but see *Robinson v. Read*, 9 B. & C. 449; 4 M. & R. 349.

(*m*) Vide the Chapter on CONSIDERATION, DEBT OF A THIRD PARTY.

CHAPTER
XX.HOW THE DIS-
CHARGE OF
THE SURETY
MAY BE
PREVENTED.

Thirdly, as to the means by which the discharge of the principal may be prevented from operating as a discharge of the surety.

It has been repeatedly held, and is now well established, that a giving of time by the creditor to the principal debtor will not discharge the surety, if there be an agreement between the creditor and the principal, that the surety shall not be thereby discharged (*n*), although the surety himself be no party to the stipulation, or even have no notice of it (*o*). And the surety's remedy over against the principal is intact, whether the surety be or be not a party (*p*), unless the instrument amount to a release, or to a release of one of several joint or joint and several debtors (*q*). This stipulation, reserving the rights of the surety, must in general appear on the face of the instrument giving time, and cannot, if the indulgence be in writing, be proved by parol (*r*). But that is not always necessary where the agreement to reserve the sureties' rights is distinct and collateral (*s*).

No indulgence to an acceptor or other prior party will discharge an indorser, if the indorser previously consent to it. Thus, where the acceptor, having been arrested by the holder, offered him a warrant of attorney for the amount of the bill payable by instalments, and, the holder mentioning the offer to the drawer, the drawer said, "You may do as you like, for I have had no notice of the non-payment;" it was held that this amounted to an assent, and that the drawer (who, in fact, had had notice) was not discharged by the indulgence (*t*).

HOW IT MAY
BE WAIVED.

Fourthly, as to the mode in which the operation of indulgence to the principal on the liability of the surety may be waived.

(*n*) *Burke's case*, 6 Ves. 809; *Boulton v. Stubbins*, 18 Ves. 20; 11 R. R. 141; *Ex parte Glendinning*, Buck. 517; *Ex parte Carstairs*, ibid. 560; *Harrison v. Courtauld*, 3 B. & Ad. 36; *Nichols v. Norris*, ibid. 41, n.; *Cowper v. Smith*, 4 M. & W. 519; *Smith v. Winter*, ibid. 454; *North v. Wakefield*, 13 Q. B. 258; *Owen v. Homan*, 4 H. L. Cases, 997.

(*o*) *Webb v. Hewitt*, 3 K. & J. 438.

(*p*) *Kearsley v. Cole*, 16 M. & W. 128; *Webb v. Hewitt*, 3 K. & J. 438.

(*q*) Ibid. It is not unusual to insert in the original contract of suretyship a stipulation, that a composition with the principal shall not release the surety. See *Cowper v. Smith*, 4 M. & W. 519.

(*r*) Ubi supra.

(*s*) *Ex parte Harvey*, 23 L. J., Bank. 26; *Wyke v. Rogers*, 21 L. J., Ch. 611; 1 De G., M. & G. 408. But see *Ex parte Glendinning*, Buck. 517, where time is given by deed.

(*t*) *Clark v. Derlin*, 3 B. & P. 363; 7 R. R. 793.

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Wherever the surety, with knowledge of the facts, assents either by words or acts to what has already been done, such subsequent assent will be a waiver of his discharge without any new consideration (*u*). Therefore, where time had been given, and the drawer, aware of the fact, but ignorant of the law, and conceiving himself still liable, said, "I know I am liable, and if the acceptor does not pay it I will," the drawer was held to have waived his discharge (*x*). But where a bill was renewed, and an indorser said, "It was the best thing that could be done," it was held that this was no recognition of his liability (*y*).

Fifthly, as to discharge of principal by dealings with surety.

If the principal and sureties are jointly liable, *e.g.*, if they are joint makers of a note, then a discharge to a surety by the creditor releasing him, or making him executor, or taking from him a composition, and erasing his name from the note, will be a discharge of the co-surety, and also of the principal debtor (*z*); but the discharge, in this case, does not proceed on the law of principal and surety.

WHAT CON-
DUCT OF THE
HOLDER
TOWARDS
THE SURETY
WILL DIS-
CHARGE THE
PRINCIPAL.

Lastly, as to the rights of sureties.

A drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill or note may recover from the acceptor or maker, the drawer, or a prior indorser, the amount of the bill with interest (*a*). He may also avail himself of the third party procedure, and cause his principal or principals to be made parties to the action upon such terms as to costs as the Court may decide (*b*).

RIGHTS OF
SURETIES.

If one who is surety on a joint and several note, signed by the principal, pay the amount, though without any request or compulsion by the creditor, he may recover it of the principal (*c*). A surety, on payment of the debt, was entitled

Surety's right
to indemnity.

(*u*) *Mayhew v. Crickett*, 2 Swanst. 185; 19 R. R. 57; *Smith v. Winter*, 4 M. & W. 467.

(*x*) *Sterens v. Lynch*, 12 East, 38; 2 Camp. 331; *Smith v. Winter*, 4 M. & W. 454.

(*y*) *Withall v. Masterman*, 2 Camp. 179; *Clark v. Derlin*, 3 B. & P. 363; 7 R. R. 793; *Tindal v. Brown*, 1 T. R. 167; 1 R. R. 171; *English v. Darley*, 2 B. & P. 61; 5 R. R. 543.

(*z*) *Nicholson v. Revill*, 4 Ad. & E. 675; 6 N. & M. 192; 1 Har. & W. 753, where the note was

joint and several.

(*a*) Code, s. 57. A voluntary payment by drawer or indorser will not comply with the terms of the section: hence if a drawer or indorser, who has been discharged for want of due notice of dishonour, pay, he will not be entitled to recover. *Horn v. Rouquette*, L. R., 3 Q. B. D. at p. 519.

(*b*) Ord. XVI. rr. 48—54.

(*c*) Or the co-surety's proportion of the co-surety. *Pitt v. Pursord*, 8 M. & W. 538.

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XX.

in equity to existing securities which the creditor may possess against the principal debtor (*d*). And he had such a right even at law, on giving a proper indemnity, and might sue in the creditor's name (*e*). A contract to indemnify a surety entitles the surety to interest (*f*).

A promise by a stranger to indemnify a surety is not within the 4th section of the Statute of Frauds, and therefore need not be in writing (*g*).

If a surety pay money to the creditor under a mistake as to the fact supposed to constitute his liability, he may recover it back (*h*).

A surety who has paid for his principal is a creditor who may be barred by a composition deed, though he have not consented to it (*i*).

Of contribu-
tion between
co-sureties.

Where the sureties are not, as between themselves, principal and surety, as are a prior and subsequent indorser of a bill or note, but merely co-sureties, as are two or more joint or joint and several makers of a note, if one be called on to pay the whole debt, the others shall severally contribute in equal proportions.

And though the same debt be secured by different instruments, executed by different sureties, and though one portion of the debt be secured by one instrument, and one by another, and different sureties execute each, still there is mutual contribution (*k*); nay, even though the surety seeking contribution did not at the time of the contract know that he had any co-sureties. For the right of a co-surety to enforce contribution does not depend upon contract, but upon the equity of the case (*l*).

(*d*) See *Copis v. Middleton*, 1 T. & R. 229; 17 R. R. 226; *Hodgson v. Shaw*, 3 M. & K. 190; *Godard v. White*, 2 Giff. 449; *Newton v. Chorlton*, 13 Hare, 651. And to what has been realized on them, *Gray v. Seckham*, L. R., 7 Chan. Ap. 680; 41 L. J., Chan. 281.

(*e*) 19 & 20 Vict. c. 97, s. 5; *Butchelor v. Lawrence*, 9 C. B., N. S. 543. An indorser compelled to pay is entitled to securities deposited with the acceptor to meet the bill, whether he was aware of the fact or not. *Duncan, Fox & Co. v. New South Wales Bank*, 6 App. Ca. 1. And see post, DEPOSITED SECURITIES, Chapter on BANKRUPTCY.

(*f*) *Petre v. Duncombe*, 20

L. J., Q. B. 242; *Ex parte Davies*, 66 L. J., Q. B. 499.

(*g*) *Cripps v. Hartnall*, 32 L. J. 381, Exch. Chamber; *Batson v. King*, 4 H. & N. 739.

(*h*) *Mills v. Alderbury Union*, 3 Exch. 590.

(*i*) *Hooper v. Marshall*, L. R., 5 C. P. 5; 39 L. J. 14.

(*k*) *Dering v. Earl of Winchelsea*, 2 Bos. & P. 270; 1 Cox, 318; 1 R. R. 41; *Mayhew v. Crickett*, 2 Swanst. 184; 19 R. R. 57; *Whiting v. Burke*, L. R., 6 Chan. Ap. 342.

(*l*) See *Craythorn v. Swinburne*, 14 Ves. 169; 9 R. R. 264; *Reynolds v. Wheeler*, 30 L. J., C. P. 350; *McDonald v. Whitfield*, L. R., 8 Ch. Ap. 733.

A surety has a right of action against his principal for every sum that he pays, and a right of action against his co-surety as soon as he has paid more than his own due proportion of the debt (*m*). He has a fresh right of action against the co-surety for every sum that he pays beyond that amount.

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XX.

Action
between co-
sureties.

The proper legal remedy for a surety, who has paid more than his due proportion of the debt against his co-surety, was an action for money paid to the use of the co-surety (*n*). But a surety could not at law recover more than an aliquot part of the debt against his co-surety, although others of the sureties be insolvent (*o*). To distribute the loss arising from the insolvency of co-sureties, a co-surety must have resorted to equity. And although in equity the loss arising from the insolvency of sureties must be equally borne by the solvent sureties, yet that liability may be restrained by the express contract of the sureties (*p*). Now a defendant claiming contribution, or indemnity over against any other person, may by leave of a judge give notice to such other person, who, if desirous of disputing the plaintiff's claim, may appear as a party to the action (*q*): should he not so appear, he will be deemed to have admitted the validity of the plaintiff's claim or judgment against the defendant (*r*). A collateral surety may contract to be liable only in the event of the default of the principal debtor and the other sureties (*s*). A surety is not in general liable for interest.

The right of a surety to contribution from his co-surety is not prejudiced by the plaintiff possessing a security against the principal debtor which the defendant does not possess, and of which he was not aware (*t*).

It has been held, that a surety on a continuing guarantee has a right to determine his liability for future advances by notice (*u*): even although the duration of the advances be limited by the instrument of suretyship (*x*).

Determina-
tion of the
contract.

(*m*) *Davies v. Humphreys*, 6 M. & W. 153; *Cowell v. Edwards*, 2 B. & P. 268; *Browne v. Lee*, 6 B. & C. 689.

(*n*) *Kemp v. Finden*, 12 M. & W. 421.

(*o*) *Cowell v. Edwards*, 2 Bos. & P. 268; *Browne v. Lee*, 6 B. & C. 689; *Batard v. Hawes*, 22 L. J., Q. B. 443.

(*p*) *Swaine v. Ware*, 1 Cha. Rep. 149; *Collins v. Prosser*, 1 B. & C. 682; 25 R. R. 540.

(*q*) Order XVI. rr. 48 *et seq.*

(*r*) Rule 49.

(*s*) *Craythorn v. Swinburne*, 14 Vesey, 160; 9 R. R. 264; *Hartley v. O'Flaherty*, L. & G. temp. Plunket, 217.

(*t*) *Done v. Whalley*, 17 L. J., Exch. 225; 2 Exch. 198.

(*u*) Per Lord Tenterden, *Brocklebank v. Moore*, 2 Stark. on Ev. 371.

(*x*) *Offord v. Davis*, 31 L. J., C. P. 319.

CHAPTER XXI.

ALTERATION OR FORGERY OF A BILL OR NOTE.

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CHAPTER
XXI.

Effect of
alteration at
common law.

If a deed, well and sufficiently made in its creation, shall be afterwards altered by rasure, interlining, addition, drawing a line through the words, though they be still legible, or by writing new letters upon the old in any material place or part of it, either by the party that hath the deed, or any other whomsoever, unless the alteration be by him who is bound by the deed (for he shall not take advantage of his own wrong), or by his consent, the deed has lost its force, and is become void (a).

(a) Sheppard's Touchstone, 68. And a deed is not it seems vacated at common law, if the alteration, though material, were with the consent of all the parties. *Markham v. Gonaston*, Cro. Eliz. 627 ; *Zouch v. Clay*, 2 Lev. 35 ; Com. Dig. Fait, F. 1.

And by a formal decision, a deed, bill of exchange, promissory note, guarantee, or any other executory written contract, is avoided by an alteration in a material part, made while it is in the custody of the plaintiffs, although that alteration be by a stranger (*b*). For a person who has the custody of an instrument is bound to preserve it in its integrity. And as it would be avoided by his fraud in altering it himself, so it shall be avoided by his *laches* in suffering another to alter it.

The rules relating to alteration or rasure of deeds apply (at least, for the most part) to other written contracts, and to bills and notes. Thus, where a bill was drawn payable to A. B., and whilst in his possession the date was altered, and the bill was subsequently indorsed to the plaintiffs for value, it was held that they could not recover against the acceptor. "It seems admitted," says Ashhurst, J., "that if this had been a deed, the alteration would have vitiated it. Now, I cannot see any reason why the principle, on which a deed would have been avoided, should not extend to a case of a bill of exchange. There is no magic in parchment or wax, and the principle to be extracted from the cases is, that any alteration avoids the contract. If A. B. had brought this action, he could not have recovered, because he must suffer from any alteration of the bill whilst in his custody; the same objection must hold against the plaintiffs, who derive title from him" (*c*). So, where the drawer, *without the consent of the acceptor*, added to the acceptance the words, "Payable at Mr. B.'s, Chiswell Street," it was held that this was a material alteration, discharging the acceptor (*d*). And the same point has been repeatedly decided since the 1 & 2 Geo. 4, c. 78. "Suppose," says Abbott, C.J., "a bill so altered to be indorsed to a person ignorant of the alteration; his right to sue his indorser would, as the bill appears, be complete, upon default made where the bill is payable; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by

Of bills and
notes.

(*b*) *Davidson v. Cooper*, 11 M. & W. 778; affirmed in error, 13 M. & W. 343; *Bank of Hindustan v. Smith*, 36 L. J., C. P. 241.

It is held in America that an alteration by a stranger, though material, will not render the instrument inoperative. See 6th American ed. of Byles on Bills, p. 482.

B.B.E.

(*c*) *Muster v. Miller*, 4 T. R. 320; in error, 2 H. Bl. 140; 2 R. R. 399; *Hirschman v. Budd*, L. R., 8 Ex. 171; *Vance v. Louther*, L. R., 1 Ex. Div. 126. The defence was capable of being raised by a plea traversing the acceptance; but see now Ord. XIX. rr. 6 & 15.

(*d*) *Convic v. Halsall*, 4 B. & Al. 197; 3 Stark, 36. Code, s. 64 (2).

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such non-payment. I am of opinion, therefore, that the alteration is in a material part of the bill, and the acceptor is, in consequence, discharged" (e).

But it has been held by the same learned judge (f), and by the Court of Exchequer, that a similar addition, *with the consent of the acceptor*, would not invalidate the instrument, either at common law or under the Stamp Act. Where a bill was addressed to A. B. & Co., and the acceptance was by A. and B., and the address was afterwards altered to correspond with the acceptance, as the acceptors would be liable either way, the alteration was held to be immaterial (g). An alteration of a foreign bill, by adding either on the face of the bill or to the indorsements the rate of exchange, according to which the bill is to be paid, is fatal (h).

The addition of the words "interest to be paid at six per cent. per annum," written at the *corner* of the note, and not in the body, is a material alteration avoiding the note (i).

UNDER THE
STAMP ACTS.

But, secondly, even if the consent of all parties have been obtained to an alteration in a material part, such alteration, nevertheless, avoids the bill under the stamp laws; for it is become a new and different instrument, and therefore requires a new stamp; which stamp cannot, as we have seen, then be affixed (k). An alteration in the date, sum (l), or time of payment, the insertion of words rendering negotiable an instrument which before was not so, altering the words "*value received*" into an expression of the particular

(e) *M'Intosh v. Haydon*, Ry. & M. 362; 27 R. R. 757; *Desbrowe v. Weatherby*, 1 M. & Rob. 438; 6 C. & P. 758; *Taylor v. Moseley*, 1 M. & Rob. 439, n.; *Semple v. Cole*, 8 L. J., Exch. 155. These decisions were confirmed by the Court of Queen's Bench in *Burchfield v. Moore*, 23 L. J., Q. B. 261; 3 E. & B. 683; *Gardner v. Walsh*, 5 E. & B. 83.

(f) *Sterens v. Lloyd*, M. & M. 292; and see *Jacobs v. Hart*, 6 M. & S. 142; 18 R. R. 335; *Walter v. Cubley*, 2 C. & M. 151; but in *Walter v. Cubley* the attention of the Court was not drawn to *Gibb v. Mather*, 8 Bing. 221; 1 Moore & S. 387; 2 C. & J. 254; 34 R. R. 688. Would not the alteration have been material in

an action against the drawer? *Sterens v. Lloyd*, M. & M. 292; and if so, was not the legal effect of the instrument altered?

(g) *Farquhar v. Southey*, M. & M. 17; 2 C. & P. 497; 31 R. R. 689; *Hamelin v. Bruck*, 15 L. J., Q. B. 343; 9 Q. B. 306.

(h) *Hirschfield v. Smith*, 35 L. J., C. P. 177; L. R., 1 C. P. 340, though the additions were in red ink.

(i) *Warrington v. Early*, 23 L. J., Q. B. 47.

(k) *Wilson v. Justice*, Bayley, 6th ed. 118; *Bowman v. Nichol*, 5 T. R. 537; 1 Esp. 81. Stamp Act, 1891, s. 37 (2); ante, p. 124.

(l) *Hamelin v. Bruck*, 15 L. J., Q. B. 343; 9 Q. B. 306.

consideration which passed, are respectively material alterations, avoiding the bill under the Stamp Acts (*m*). But the addition of another name to a joint and several note on a different part of the face of the note, with the assent of all parties, has been held, *ut res magis valeat*, to operate as an indorsement (*n*).

There are, however, two cases in which an alteration, though in a material part, will not vacate the instrument ; first, where such an alteration is made before the bill is issued, or become an available instrument ; and, secondly, where the bill is altered to correct a mistake, or supply an omission, and in furtherance of the original intention of the parties (*o*).

Where an alteration will not vitiate.

Thus, where the drawer of a bill, payable to his own order, sent it to the drawee for acceptance, and the drawee requested that a longer time might be allowed for payment, and an alteration to that effect was accordingly made with the consent of the drawer, and the bill was afterwards accepted ; it was held that, the alteration being made before the bill was an available instrument against any party, a new stamp was unnecessary (*p*). Upon the same principle, where three persons joined, as drawer, acceptor, and indorser, in the fabrication of an accommodation bill, and the date was altered before it came into the hands of a holder for value ; it was held that, as the accommodation parties could not sue upon it *inter se*, it was not, till it came into the hands of a holder for value, an available instrument, and therefore that an alteration before that time did not vitiate it. "The question," says Abbott, C.J., "is, whether this alteration made it a new bill? Now, undoubtedly, when an accommodation bill has the different parties written upon it, it is, in some sense of the word, a bill of exchange ; but it is utterly unavailable as a security for money, until it is issued to some real holder for a valuable consideration. It first became a bill of exchange when it was issued to the indorsee for a valuable consideration." "Here," adds

Before the bill is issued.

(*m*) *Bathe v. Taylor*, 15 East, 412 ; *Walton v. Hastings*, 4 Camp. 223 ; 1 Stark, 215 ; *Outhwaite v. Luntley*, 4 Camp. 179 ; 16 R. R. 771 ; *Knill v. Williams*, 10 East, 431 ; 10 R. R. 349. The words "not negotiable" may be added at any time to a crossed cheque, see p. 30.

(*n*) *Ex parte Yates*, 27 L. J., Bank. 9 ; 2 De G. & J. 191 ;

Gardner v. Walsh, 5 E. & B. 83 ; Coxe, s. 56.

(*o*) *Cutton v. Simpson*, 8 Ad. & E. 136 ; overruled by *Gardner v. Walsh*, 5 E. & B. 83 ; but see *Ex parte Yates*, supra, and *Dodge v. Pringle*, 29 L. J., Exch. 115 ; *Aldous v. Cornwall*, L. R., 3 Q. B. 573 ; 37 L. T. 201 ; 9 B. & S. 607.

(*p*) *Kennerley v. Nash*, 1 Stark. 452.

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Best, J., "at the time when the alteration was made, the bill was a perfect bill in form, but it did not constitute a valid contract between the parties. A bond is a perfect instrument before delivery; but still an alteration made before delivery will not vitiate it" (*q*). But if either payee or indorsee have given value for it, so that the drawer is liable, an alteration, though before acceptance, vacates the bill. "In such a case," says Lord Ellenborough, "it does not remain *in fieri* till acceptance. As to the drawer, it was before then a perfect instrument (*r*). When the date was altered, a new bill was drawn, and that could not be done without a new stamp" (*s*). So, if a promissory note be signed by A., and subsequently by B. as surety for A., whilst the note is in the hands of the payee, it will be void, unless the signature of B. is in pursuance of a previous agreement at the time of making the note (*t*). And an altered bill, if the alteration be apparent, will be void in the hands of an innocent indorsee, as well as in the hands of parties cognizant of the alteration (*u*).

To correct a mistake.

If, again, the alteration were merely to correct a mistake, or to make a bill what it was originally intended to be, it will not avoid it under the Stamp Act. Thus, where the drawer intended to make the bill negotiable, and indorsed it over, but had omitted the words "*or order*" their subsequent insertion in pursuance of the original intention was held not to vacate the bill (*x*). So, where a bill having been dated, by mistake, 1822, instead of 1823, the agent of the drawer and acceptor, to whom it had been given to be delivered to the indorsee, without their knowledge or consent corrected the mistake; it was held, that such alteration did not vacate the bill (*y*). So, again, a man, who has agreed beforehand to be a surety, may, after the

(*q*) *Downes v. Richardson*, 5 B. & Ald. 674; 1 D. & R. 332; 24 R. R. 522; *Turleton v. Shingler*, 7 C. B. 812. An alteration of the date before issue without the consent of the acceptor avoids the acceptance; *Engel v. Stourton*, 5 Times, L. R. 444. As to the alteration of a deed after execution by one party, see *Jones v. Jones*, 1 C. & M. 721; before complete delivery, *Spicer v. Burgess*, 1 C., M. & R. 129; 4 Tyr. 598.

(*r*) *Walton v. Hastings*, 4 Camp. 223; 1 Stark. 215.

(*s*) *Outhwaite v. Luntley*, 4

Camp. 179; 16 R. R. 771.

(*t*) *Clerk v. Blackstock*, Holt, N. P. C. 474; 17 R. R. 667. See *Ex parte White*, 2 Deac. & Chitt. 334.

(*u*) *Outhwaite v. Luntley*, 4 Camp. 179; 16 R. R. 771; Code, s. 64, prov.

(*x*) *Kershaw v. Cox*, 3 Esp. 246; 10 East, 437; *Jacobs v. Hart*, 2 Stark. 45; 6 M. & Sel. 142; 18 R. R. 335; *Byron v. Thompson*, 11 Ad. & Ell. 31; 3 P. & D. 71.

(*y*) *Brutt v. Picard*, R. & M. 37; 27 R. R. 727.

advance to another maker, sign the note (z). A *bonâ fide* holder of a bill of exchange accepted payable to ———, or order, may insert his own name as payee, and indorse it, and the bill may be declared on as payable to the party who has inserted his name. "One," says Best, C.J., "who accepts a bill in this form, undertakes to be answerable for it in the shape of a bill. That being so, he undertakes to be answerable for it in the form which a *bonâ fide* holder has a right to give it, and the description in the declaration is made out against him. No new stamp is necessary; the first stamp gives authority for the insertion" (a). Whether the intent of the alteration were to vary the original contract, or merely to correct a mistake, is a question of fact for the jury (b).

The code by sect. 64 regulates the effect of alteration in a material part of a bill or note in avoiding the instrument (c). Where a bill or note or an acceptance (d) is materially altered without the consent of all parties liable thereon, it is avoided: except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

Provisions of
the code.

And the following alterations are declared to be material:—

What altera-
tions are
material.

- an alteration in the date (e);
- in the sum payable;
- in the time of payment;
- in the place of payment;

and the insertion of a place of payment without the acceptor's assent where the bill has been accepted generally.

(z) *Dodge v. Pringle*, 29 L. J., Exch. 115.

(a) *Attwood v. Griffin*, R. & M. 425; 2 C. & P. 368; Code, s. 20.

(b) *Ibid.*

(c) By sect. 97 the existing Stamp Act (54 & 55 Vict. c. 39) is not interfered with; this may be material in showing up to what time an alteration may be made without the necessity for a new stamp, which cannot in general be affixed, and also to prevent frauds on the revenue, such as an attempted increase of the amount of the bill or note to a larger sum than that warranted by the stamp under cover of an

assent of parties. Sect. 89 extends the provisions as to bills to promissory notes. The code therefore only authorizes such alterations in a bill or note as do not avoid it under the Stamp Act.

(d) An acceptance may be given before the bill is signed by the drawer or while it is otherwise incomplete. Code, ss. 18 and 20.

(e) An alteration in the date avoids a Bank of England note. *Leeds and County Bank v. Walker*, L. R., 11 Q. B. D. 84. So, too, it has been held of an alteration in the number, *Suffell v. Bank of England*, 3 Q. B. D. 555; 51 L. J.

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apparent.

Provided that where a bill or note has been materially altered but the alteration is not apparent, a holder in due course is not prejudiced, but may enforce payment according to the original tenour of the instrument (*f*).

But if the alteration be apparent, a *bonâ fide* transferee for value is in no better position as to his remedy on the bill or note than his transferor (*g*).

When the
alteration of
the instru-
ment ex-
tinguishes
the debt.

An alteration by the drawer and payee of the bill, or the payee of a note, though it avoids the instrument, does not extinguish the debt (*h*); but an alteration by an indorsee not only avoids the security as against all parties, but also extinguishes the debt due to the indorsee from the indorser (*i*). For it would be unjust that the indorsee should compel the indorser to pay his debt, when the indorsee has destroyed the instrument on which alone, in some cases, and on which preferably in all cases, the indorser should sue. To make the indorser liable on the consideration, and give him a cross action against the indorsee for the alteration, would be to oblige him to rely on the indorsee instead of the antecedent parties, and to prove a fact of which he might have no evidence; it would besides introduce a needless circuitry of action.

Renewal of
altered bill.

If a bill be altered so that a man otherwise liable on it is discharged, he is not liable on a bill given in renewal of the altered bill, unless he were actually

401. But the code does not make the number a material part of a bank note. The crossing of a cheque is also made a material part of it, sect. 78, and therefore presumably falls within the general part of sect. 64, though not specified in sub-s. (2).

(*f*) Code, s. 64 (1), prov. *Scholfield v. Londesboro*, [1896] Ap. Ca. 514; 65 L. J. 593. In *Leeds Bank Co. v. Walker*, 11 Q. B. D. 84, where an alteration in the date of a Bank of England note, though apparent to a practised eye, was not so to an ordinary observer; it was held that sect. 64 did not apply as the alteration was "apparent," that sect. 89 did not apply it to Bank of England notes even if retrospective, and

that the transferor by delivery of a worthless note was liable on his implied warranty of genuineness, *Jones v. Ryde*, 5 Taunt. 488; 15 R. R. 561; Code, s. 58 (3), in an action for money had and received.

(*g*) *Burchfield v. Moore*, 23 L. J., Q. B. 261; 3 E. & B. 683; Code, s. 29 (1).

(*h*) *Sutton v. Thomer*, 7 B. & C. 416; 1 M. & R. 125; *Atkinson v. Hawdon*, 2 Ad. & E. 628; 4 N. & M. 409; 1 H. & W. 77; see *Sloman v. Cox*, 1 C., M. & R. 471; 5 Tyr. 174. Unless the bill or note were taken in satisfaction of the debt. *McDowall v. Boyd*, 17 L. J., Q. B. 295.

(*i*) *Alderson v. Langdale*, 3 B. & Ad. 660; 37 R. R. 513.

A prom. note was in favour of the G. O. Co., who had become a limited liability Co. An officer inserted "Ltd" on the face of the note. Held: if material, not an apparent alteration, hence as indorser on behalf of the G. O. Co. indorsement irregular. *Bank of Montreal v. Exhibition & Trading Co.* 22 T. L. R. 722. *Phillimore, J.*

apprised of the alteration at the time he gave the substituted bill (*k*).

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It is conceived, notwithstanding certain decisions, that the alteration of a bill or note need not, when the plaintiff declared on the instrument *in its altered state*, have been specially pleaded. When altered, it is no longer the same instrument that the defendant signed, and moreover, there is no stamp applicable to the altered instrument, so that it cannot be looked at by the jury to prove the new contract. Therefore the defendant might, under the plea that he did not make, accept, or indorse the instrument set forth in the declaration, show the alteration, and thereby prove that he executed another instrument, and not that in question (*l*), or if there be no fresh stamp, that there is no instrument which the jury can look at.

When alteration need not have been pleaded.

But where the declaration was on the instrument, in its original condition, the alteration must have been specially pleaded (*m*), as apparently it must be now.

When it must have been pleaded.

The plea, where it merely relied on the absence of a proper stamp on the altered instrument, must have shown that the bill or note could not be made good by being stamped before the trial (*n*).

Requisites of plea.

Where an alteration appears on the face of a bill or note, it lies on the plaintiff to show that it was made under such circumstances as not to vitiate the instrument (*o*). And this

BURTHEN OF PROOF.

(*k*) Means of knowledge are not equivalent to actual knowledge. *Bell v. Gardiner*, 11 L. J., C. P. 195; 4 M. & G. 11.

(*l*) *Cock v. Corwell*, 2 C., M. & R. 291; 4 Dowl. 187; 1 Gale, 177; *Culvert v. Baker*, 4 M. & W. 417; 7 Dowl. 17; *Langton v. Lazarus*, 5 M. & W. 629; *Knight v. Clements*, 8 Ad. & E. 215; *Field v. Woods*, 7 Ad. & E. 114; *Crotty v. Hodges*, 4 M. & G. 563, and *Clifford v. Parker*, 2 M. & G. 909. But see now Ord. XIX. r. 15.

(*m*) *Hemming v. Trenery*, 9 Ad. & E. 926; 1 Per. & Dav. 661; *Bridgman v. Sheehan*, cor. Parke, B., at Nisi Prius, T. T. 1842; *Mason v. Bradley*, 12 L. J., Exch. 425; 11 M. & W. 590. This distinction does not appear to have been recognized in some of

the cases. See *Parry v. Nicholson*, 13 M. & W. 778. But the most recent decision is in accordance with the view of the law taken in the text. *Hirschman v. Budd*, L. R., 8 Ex. 171. See now Ord. XIX. rr. 5 and 15.

(*n*) *Bradley v. Bardsley*, 15 L. J., Exch. 115; 3 D. & L. 476; 14 M. & W. 873.

(*o*) *Johnson v. Duke of Marlborough*, 2 Stark. 313; *Henman v. Dickinson*, 5 Bing. 183; 2 M. & P. 281; 30 R. R. 565; *Knight v. Clements*, 3 N. & P. 375; 8 Ad. & E. 215; *Bishop v. Chamber*, 1 M. & M. 116; 3 C. & P. 55; 33 R. R. 646. In *Sibley v. Fisher*, 7 Ad. & E. 444; 2 N. & P. 420, the making of the bill, as described in the declaration, was admitted on the record. See *Karl*

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rule is most reasonable ; for, if it lay on the defendant, on an acceptor for example, sued by an indorsee, to show that the alteration was improperly made, it might be a great hardship, for he may have no means of proving that the bill went unaltered from his hands, or of showing the circumstances of a subsequent alteration. But the burthen of explaining an alteration imposes no hardship on the plaintiff, for if the bill was altered while in his hands, he may, and ought to account for it ; if before, then he took it with a mark of suspicion on its face, which ought to have induced him either to refuse it, or to require evidence of the circumstances under which the alteration was made (*p*).

FORGERY.

Forgery is the counterfeit making or altering of any writing with intent to defraud (*q*). It is a misdemeanor at common law, and a conviction formerly rendered a man incompetent as a witness (*r*).

Existing
statutes.

The present statute is the 24 & 25 Vict. c. 98. Sections 8, 12, and 22 make forging, altering, or uttering any exchequer bill, bank note, bill of exchange, or promissory note, or indorsement thereof, a felony. Fraudulently obliterating, altering, or uttering the crossing of a cheque is a felony (*s*).

Fraudulently signing a bill or note for any other person by procuration or otherwise, or uttering the same, is a felony (*t*).

of *Falmouth v. Roberts*, 9 M. & W. 471 ; *Disbrowe v. Weatherley*, 6 C. & P. 758 ; *Semple v. Cole*, 8 L. J., Exch. 155 ; 3 Jurist, 268. And whether the alteration were before or after the completion of the bill, has been left as a question of fact for the jury. *Taylor v. Moseley*, 6 C. & P. 273 ; and see *Leykrieff v. Ashford*, 12 Moore, 281. Subsequent consent cannot ratify an alteration, *Sutton v. Blakey*, [1897] 13 T. L. R. 441.

It is said that the presumption against the legality of an alteration is confined to the cases of a bill of exchange or promissory note and a will. See *Doe v. Cutamore*, 16 Q. B. 745, and *Doe v. Palmer*, 16 Q. B. 747, and the note to *Master v. Miller*, 1 Smith's L. C. 10th ed. 747.

(*p*) The Supreme Court of

Pennsylvania, in *Simpson v. Stackhouse*, 9 Barr. 186, held that the onus of showing that an alteration in a material part of a negotiable instrument was lawfully made is on the holder ; and that where the place of payment is in a different handwriting from the body of the instrument, there is a presumption of alteration. See the 6th American ed. of Byles on Bills, p. 493.

(*q*) 4 Bla. Com. 248 ; *R. v. White*, 1 Den. C. C. 208.

(*r*) Com. Dig. Testm. A. 5 ; *R. v. Davis*, 5 Mod. 74. He is now capacitated by 6 & 7 Vict. c. 85.

(*s*) Sects. 22 and 25. Code, s. 78, makes the crossing of a cheque a material part.

(*t*) Sect. 24. See as to the previous law *R. v. White*, 2 C. & K. 404.

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Inducing a person by violence or threats to execute a bill or note or other valuable security, is a felony (*u*).

Fraudulently to obtain by false pretences a signature to a bill or note, or the destruction of the instrument, in whole or in part, is now a misdemeanor (*x*).

Forging or uttering such a bill or note as the Legislature had declared void was not within the statutes, as, for example, a bill or note for less than 20s., or a bill or note for less than 5l., which did not comply with the requisites of 17 Geo. 3, c. 30 (*y*), in the former state of the law.

Forgery of
void bills.

Where there is no payee, or no maker's name, it has been held that the offence is not within the act (*z*).

Of invalid
and informal
bills.

A mere informality, as the omission of the word POUNDS in the body, where the letter £ precedes the figures 50 in the margin (*a*), does not prevent the crime amounting to forgery.

In order to constitute forgery, it is not necessary that the instrument should be duly stamped, or stamped at all (*b*).

The most common species of forgery is, fraudulently writing the name (*c*) of an existing person. But a fraudulent misapplication of the genuine signature of another man is as much forgery as counterfeiting his signature. Thus, where the prisoner, having in his possession the genuine signature of one Thomas Gibson, wrote over it a promissory

Forgery by
misapplica-
tion of a
genuine
signature.

(*u*) 24 & 25 Vict. c. 98, s. 48. See *Rex v. Phipoe*, 2 Leach, 673; *Rex v. Edwards*, 6 C. & P. 521.

(*x*) 24 & 25 Vict. c. 96, s. 90. See *Reg. v. Danger*, 1 D. & B. C. C. 307.

(*y*) *Rex v. Moffatt*, 1 Leach, 431; 2 East, P. C. 954.

(*z*) *Rex v. Richards*, R. & R., C. C. 193; *Rex v. Randall*, R. & R., C. C. 195; and see as to other fatal defects, *Rex v. Jones*, Doug. 287; *Rex v. Pateman*, R. & R. 455; 1 R. R. 621, where there was no maker's name; *Rex v. Burke*, R. & R. 496; *Rex v. Wilcox*, Bayley, 6th ed. 11. To constitute the forgery of a bill of exchange within 1 Will. 4. c. 66, s. 4, the instrument must have been complete. *Reg. v. Turpin*, 2 C. & K. 820. Forging an acceptance to an instrument in the form of a bill,

but without the drawer's name, is not within the statute. *Reg. v. Butterwick*, 2 Moo. & R. 196; *R. v. Harper*, L. R., 7 Q. B. D. 78.

(*a*) *Rex v. Post*, R. & R. 101, and Bayley, 11; and see *Collinson's case*, 2 Leach, 1048.

(*b*) *Teague's case*, 2 East, P. C. 979; R. & R. 33; *Rex v. Hawkeswood*, 1 Leach, 257; 2 East, P. C. 955; *Rex v. Lee*, 1 Leach, 258, n.; *Merton's case*, 2 East, P. C. 955; and see Stamp Act, 1891, s. 14(4).

(*c*) Making a mark, and suffering the assumed name to be written against it, is forgery. *Rex v. Dunn*, 1 Leach, 57; 2 East, P. C. 962. Putting the address of an *existing* person to a name, being the name of another person, is forgery. *Reg. v. Blenkinsop*, 1 Den. C. C. 276.

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note for 6,400l., he was indicted and convicted of having forged the note (*d*). And where the same prisoner, having the genuine signature of Samuel Edwards, wrote on the other side of the paper a promissory note, payable to Samuel Edwards, and so turned the genuine signature into an indorsement, he was convicted of forging the indorsement (*e*). So if a clerk be intrusted to fill up a blank cheque signed by his master with a particular sum, and he fraudulently inserts a larger sum, it is a forgery of the cheque (*f*).

Misapplication of his own signature by the party signing.

There may be an innocent misapplication of his own genuine signature by the party himself. Thus, where a man was induced to sign his name to a bill by a fraudulent misrepresentation of the nature of the instrument, it was held that, if not guilty of negligence, he was not liable even to an innocent holder, any more than if he had been blind or illiterate, and the instrument had been falsely and fraudulently read over to him (*g*).

By signature of fictitious name.

To sign the name of a fictitious or non-existing person is forgery (*h*). Where the prisoner was convicted of forging an order for payment of money, and it appeared that he had bought goods from the prosecutor, and paid for them with a draft signed in the fictitious name of H. Turner, although the prosecutor had sworn that he gave credit to the prisoner and not to the draft, it was held that the prisoner was rightly convicted. The Judges said that it was a false instrument, not drawn by any such person as it purported to be, and that the using a fictitious name was only for the purpose of deceiving (*i*). But the signing a fictitious name will not amount to forgery, if it were used on other occasions as well as for that very fraud, or system of fraud, of which the forgery forms a part (*k*). Where proof is given of the prisoner's real name, and no proof of any change of name until the time of the fraud committed,

(*d*) *Rex v. Hales*, 17 St. Tr. 161.

(*e*) *Ibid.* 209. 229.

(*f*) *Reg. v. Wilson*, 17 L. J., M. C. 82; 1 Den. C. C. 284; *Rex v. Hart*, 1 Moo. C. C. 486; 7 C. & P. 652. But a holder in due course may recover under Code, s. 20.

(*g*) *Foster v. Mackinnon*, L. R., 4 C. P. 704; *Lewis v. Clay*, 67 L. J., Q. B. 224; 77 L. T., N. S. 653; and English and American cases there cited.

(*h*) *Rex v. Francis*, Bayley, 6th ed. 572; Russ. & Ry. 209; *Lockett's case*, 1 Leach, 94; East, P. C. 940; *Taft's case*, 1 Leach, 172; East, P. C. 959; or in the prisoner's own name to represent a fictitious firm; *Reg. v. Rogers*, 8 C. & P. 629.

(*i*) *Sheppard's case*, 1 Leach, 226; 2 East, P. C. 967; *Whiteley's case*, R. & R. 90.

(*k*) *Rex v. Bontien*, R. & R. 260.

it lies on the prisoner to show that he has before assumed the false name on other occasions, and for other purposes unconnected with forgery (*l*).

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It is a forgery, also, to sign a man's own name with intention that the signature should pass for the signature of another person of the same name (*m*). And where a person, whose name was Thomas Brown, was indicted for forging a promissory note signed Thomas Brown, and it appeared that he had uttered the note as a note of Captain Brown, a fictitious person, and the prisoner was convicted, the Judges held the conviction right (*n*). But the adoption of a false description and addition, where a false name is not assumed, is not forgery. Thus, where the prisoner drew a bill, and directed it to "Mr. Thomas Bowden, baize manufacturer, Romford, Essex;" and it was accepted by one Thomas Bowden, but there was no Thomas Bowden, of Romford, it was held by a majority of the Judges, that the giving a false description of Bowden on the bill, with intent to defraud, was not forgery (*o*).

By signing a man's own name.

Where the signature on the bill is genuine, an uttering by another person, with a representation that he is the person whose signature is on the bill, is not forgery, or a felonious uttering. The prisoner uttered a bill purporting to be payable to Bernard M'Carthy, or order, and having the indorsement B. M'Carthy thereon: he was indicted for forging that indorsement, and uttering it knowing it to be forged; the jury found that there was such a man as B. M'Carthy, and that the indorsement was his handwriting, but that the prisoner passed himself off as that B. M'Carthy when he uttered the bill. The Judges were unanimous, that as the indorsement was not forged the prisoner was not liable to be convicted (*p*).

Uttering a genuine signature, and personating the party signing.

Writing a principal's name "per procuration," but without authority, was not until the statute (*q*) forgery (*r*); nor, as it should seem, writing merely another man's name under a false pretence of authority (*s*), without any intention of imitating his handwriting.

Misrepresentation of authority.

- | | |
|--|--|
| (<i>l</i>) <i>Peacock's case</i> , R. & R. 278. | B. & B. 197. |
| (<i>m</i>) <i>Mead v. Young</i> , 4 T. R. 28 ;
2 R. R. 314. | (<i>p</i>) <i>Rex v. Hervey</i> , 1 Leach, 229 ;
2 East. P. C. 556 ; Bayley, 577. |
| (<i>n</i>) <i>Rex v. Parkes</i> , 2 Leach,
773 ; 2 East, P. C. 963. | (<i>q</i>) Vide ante, p. 344. |
| (<i>o</i>) <i>Webb's case</i> , R. & R. 405 ;
3 B. & B. 229 ; <i>Rex v. Watts</i> ,
R. & R. 436 ; 6 Moore, 442 ; 3 | (<i>r</i>) <i>Reg. v. White</i> , 1 Den. C. C.
208 ; 2 C. & K. 404. |
| | (<i>s</i>) Ibid. : but see <i>Aude v. Dixon</i> , 6 Exch. 869. |

CHAPTER
XXI.

Alteration.

Every fraudulent alteration, whether by subtraction, addition or substitution, is forgery, and would be so within the statutes, even did they not contain the word *alter*, as was decided on 2 Geo. 2, c. 15, which did not contain that word (*t*). The statute 11 Geo. 4 & 1 Will. 4, c. 66, contained the word “alter” as well as “forge.” Nevertheless, an alteration may be described in the indictment as forgery (*u*). So, *e converso*, the discharging one indorsement and the insertion of another may be described as the *alteration* of an indorsement (*x*).

Procuring a man to forge is an offence within the statute (*y*).

Uttering.

It has been decided that, in order to constitute an uttering, the instrument must be parted with, or tendered, or offered, or used in some way to get money or credit upon it (*z*). Therefore, where the defendant, in order to persuade an innkeeper that he was a man of substance, pulled out of his pocket-book a 500*l.* and 50*l.* note, and saying that he did not like to carry so much property about him, delivered them to the innkeeper to take charge of them for him, it was held that this did not amount to an uttering (*a*).

Procuring to
utter.

Procuring to utter has been held a common law felony only (*b*).

But procuring to utter, if the person procured were innocent of the felony, is a statutable felony in the procurer (*c*).

Statement of
the instru-
ment in the
indictment.

Before certain recent Acts of Parliament it was necessary to set out the forged instrument in the indictment in words and figures correctly: the slightest variance would have entitled the defendant to an acquittal. But the 14 & 15 Vict. c. 100, s. 5, in order to prevent justice from being defeated by clerical or verbal inaccuracies, enacted that, in all indictments for forging, or uttering any instrument, it

(*t*) *Rex v. Elsworth*, Bayley, 6th ed. 574; 2 East, P. C. 986; *Reg. v. Blenkinsop*, 1 Den. C. C. 276.

(*u*) *Rex v. Teague*, R. & R. 33; 2 East, P. C. 979; *Rex v. Post*, R. & R. 101; *Rex v. Treble*, 2 Taunt. 328; 2 Leach, 1040; R. & R. 164.

(*x*) *Rex v. Birkett*, R. & R. 251.

(*y*) *Rex v. Morris*, Bayley, 6th ed. 580; R. & R. 270.

(*z*) *Rex v. Shukard*, R. & R.

200; and see *Reg. v. Radford*, 1 Den. C. C. 59; *Reg. v. Ion*, 2 Den. C. C. 475.

(*a*) *Ibid.*; and see *Holden's case*, R. & R. 154; 2 Leach, 1019; *Palmer's case*, R. & R. 72; 2 Leach, 978; *Rex v. Morris*, R. & R. 270; *Reg. v. Hill*, 2 M. C. C. 30.

(*b*) *Rex v. Morris*, Bayley, 6th ed. 580; R. & R. 270; 2 Leach, 1096. But see now 24 & 25 Vict. c. 94, ss. 1, 2, 49.

(*c*) Bayley, 6th ed. 581.

shall not be necessary to set forth any copy or fac-simile thereof, but it shall be sufficient to describe it by any name by which it would be usually known (*d*).

An indictment for the larceny, and therefore now for the forgery, of a bill or note, may describe it, generally, as a bill of exchange or promissory note for the payment of the sum therein mentioned, without setting out the instrument (*e*). But if it be alleged in the indictment to have been signed or made by any person, the signature must be proved (*f*).

If several make distinct parts of the instrument, they are each chargeable with the forgery of the entire instrument (*g*). Those who knowingly prepare the paper or plates for the purpose are forgers (*h*).

Where several make distinct parts of the instrument.

Before the 9 Geo. 4, c. 32, s. 2, a rule of evidence existed equally anomalous and inconvenient, that in a criminal prosecution for forgery, the party whose name was forged was incompetent as a witness; but since that statute he is competent as a witness in all indictments or informations for forgery or uttering, either against principals or accessories, by common law or statute.

The party whose name is forged a competent witness.

A doubt also formerly existed, whether the making or uttering of an instrument, payable abroad, was an offence within some of the repealed statutes (*i*). But the statute 11 Geo. 4 & 1 Will. 4, c. 66, s. 30, brought within the operation of the acts against forgery, instruments made, or purporting to be made, or payable, or purporting to be so, out of England (*k*). The statute now in force is 24 & 25 Vict. c. 98, s. 40.

Forgery of foreign bills.

(*d*) And see now 24 & 25 Vict. c. 98, ss. 42, 43.

ss. 42, 43, 44. See also 16 & 17 Vict. c. 2.

(*e*) *Milne's case*. Worcester Summer Assizes, 1800, decided by all the Judges; East's P. C. 602. Before this act it was held that, in an indictment for forgery, a bank post bill could not be described as a bill of exchange, but might be described as a bank bill of exchange. *Rex v. Birkett*, R. & R. 251.

(*g*) *Rex v. Bingley*, R. & R. 446; *Rex v. Kirkwood*, 1 Mood. C. C. 304; vide *Reg. v. Cook*, 8 C. & P. 582.

(*h*) *Rex v. Dade*, 1 Mood. C. C. 307.

(*i*) *Rex v. Dick*, 16 Leach, 8; *Rex v. M'Kay*, R. & R. 71.

(*f*) *Rex v. Craven*, R. & R. 14; 2 East, P. C. 601. The statute 14 & 15 Vict. c. 100, gave most extensive powers of amendment; and as to the form of the indictment, see 24 & 25 Vict. c. 98,

(*k*) The 18th section of 11 Geo. 4 & 1 Will. 4, c. 66, applies to plates of promissory notes of persons carrying on the business of bankers in the province of Upper Canada. This act is repealed now, 24 & 25 Vict. c. 98, s. 16.

CHAPTER
XXI.Evidence in
criminal
cases.

Where the prisoner is indicted for using a fictitious name, some evidence must be given by the prosecutor that it is not his real name (*l*). But where the prisoner's real name is proved, it lies on him to show that he has before assumed the false name for other purposes (*m*).

Upon an indictment for uttering forged notes, evidence that the prisoner has uttered other forged notes is admissible as evidence of his knowledge of the forgery (*n*). But such notes must be produced, and proved to be forgeries (*o*). The admissibility of evidence, as to uttering forged bills of a different kind, has been doubted (*p*).

CIVIL CONSEQUENCES OF
FORGERY.

Where the title to a bill or note is necessarily made through a forgery, even a *bona fide* holder for value has in general no right to sue upon it (*q*), or even retain it (*r*); and, therefore, as a general rule, if the acceptor or maker pay one who derives his title through a forgery, that will not discharge him (*s*). So, if a bill or cheque be altered and made payable for a larger sum than that originally inserted, should the drawee, banker, or acceptor pay it, he cannot charge the drawer for the difference (*t*).

When the
payment is
good.

But, in case any act of the drawer facilitated or gave occasion to the forgery, he may have to bear the loss himself (*u*).

(*l*) *Rex v. Peacock*, Bayley, 6th ed. 579; R. & R. 278; *Bontien's case*, R. & R. 263.

(*m*) *Rex v. Peacock*, R. & R. 278.

(*n*) *Wylie's case*, 1 New R. 92; *Hough's case*, R. & R. 120; *Reg. v. Green*, 3 C. & K. 209.

(*o*) *Rex v. Millard*, R. & R. 245.

(*p*) *Ibid.* 247. As to the prisoner's admission relating to other bills, see *Reg. v. Cook*, 8 C. & P. 586; *Reg. v. Oddy*, 2 Den. C. C. 264; *Reg. v. Green*, 3 C. & K. 209.

(*q*) *Burchfield v. Moore*, 23 L. J., Q. B. 261; 3 E. & B. 683; *Cole*, s. 24.

(*r*) *Esdaile v. Lanauze*, 1 You. & Col. 394; *Johnson v. Windle*, 3 Bing. N. C. 225; 3 Scott, 608.

(*s*) But a banker who pays a draft on himself, payable to order on demand, need not prove the genuineness of the first or any

subsequent indorsement. 16 & 17 Vict. c. 59, s. 19; *Cole*, s. 60. But these sections do not protect other parties, so that a transferee of a cheque that had been stolen and indorsed by a forger, has no title to the proceeds as against the loser, unless the loser have been guilty of negligence in the transaction itself; *Arnold v. Cheque Bank*, L. R., 1 C. P. Div. 578; *Bobbett v. Pinkett*, L. R., 1 Ex. Div. 368; *Barendale v. Bennett*, L. R., 3 Q. B. Div. 525; in which case he would be estopped from setting up the true facts.

(*t*) *Hall v. Fuller*, 5 B. & C. 750; 8 D. & Ry. 465; 29 R. R. 383; *Smith v. Mercer*, 6 Taunt. 76; 1 Marsh. 453; 16 R. R. 576.

(*u*) *Young v. Grote*, 4 Bing. 253; 12 Moore, 484; 29 R. R. 552. See *Ingham v. Primrose*, 28 L. J., C. P. 294; 7 C. B., N. S. 82; *Ex parte Swan*, 30 L. J., C. P. 113; 7 C. B.,

So, if the acceptor of a bill tear the bill in two *animo cancellandi*, and the pieces are picked up in his presence and afterwards joined together so as to convey no notice of the cancellation to a stranger, a *bonâ fide* indorsee for value may acquire a title (*x*).

It is a general rule of law, that money paid under a mistake, *as to facts*, may be recovered back. On this principle, if a forged note be discounted, the transferee, on discovery of the forgery within a reasonable time, may recover back the money paid, the imagined consideration totally failing (*y*). But any fault or negligence on the part of him who pays the money on the note will disable him from recovering. Thus, where two bills of exchange falling due at different times were drawn on a man, and he paid the first without acceptance, and accepted and paid the second, and the signature of the drawer was sometime afterwards discovered to be a forgery, Lord Mansfield held, that an acceptor is bound to know the handwriting of the drawer, and that it is rather by his fault or negligence than by mistake, if he pays on a forged signature (*z*). So, where a forged acceptance of the drawee was made payable at the plaintiffs, the drawee's bankers, and they paid the amount to the defendant, as a *bonâ fide* holder, but seven days afterwards, upon discovering the acceptance to be a forgery, informed the defendant of it, and demanded the money; it was held that they could not recover, for that a banker ought to know his customer's handwriting. Part of the Court held the defendant discharged, on the ground that, by the plaintiff's delay in giving notice of the forgery, he

When money paid in discharge of a forged bill may or may not be recovered back.

N. S. 400; *Orr v. Union Bank of Scotland*, 1 Macq. H. of L. Cases, 513; *British Linen Company v. Caledonian Insurance Company*, 4 Macq. H. of L. Cases, 107; *Foster v. Green*, 6 H. & N. 793. And it has been held that a principal who, through his own agent, sends money to his creditor, which is misapplied by his agent, is not responsible any further to the creditor, if the creditor's conduct facilitated the agent's fraud. *Horsfall v. Fountleroy*, 10 B. & C. 755. *Lewis Sanitary Steam Laundry*

(*x*) *Ingham v. Primrose*, supra. This doctrine of estoppel has never been extended to instruments under seal: such an extension was attempted in *Ex parte*

Swan, 30 L. J., C. P. 113: 7 C. B., N. S. 400. But the Court of Common Pleas being equally divided, the rule dropped. The Court of Exchequer Chamber held that there was no estoppel. *Ibid.*, 32 L. J., Exch. 273.

(*y*) *Jones v. Ryde*, 5 Taunt. 488; 1 Marsh. 157; 15 R. R. 561; *Bruce v. Bruce*, 6 Taunt. 495; 1 Marsh. 165; 15 R. R. 566, n.; *Gurney v. Womersley*, 4 E. & B. 133; *In London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7; 65 L. J. 80, the holder's position having been altered it was held that the payment must stand.

(*z*) *Price v. Neal*, 3 Burr. 1354; 1 W. Bl. 390.

Imperial Bank of Canada v. Bank of Hamilton [1903] A.C. 49

v. Bank of Canada
9563444
(Kenny)
where T & C
Co employed a
forger as
Secretary.

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XXI.

had lost his remedy against the antecedent parties (a). Where the fault is not entirely on the side of the party paying, he may still recover. Certain bills of exchange, purporting to bear, amongst others, the indorsement of A., were refused payment; the notary took them to the plaintiff, the London correspondent of A., and asked him to take up the bills for A.'s honour. The plaintiff, accordingly, paid the money to the defendants, holders of the bills, and struck out all the indorsements subsequent to A.'s. The same morning it was discovered that the respective signatures of A., the drawer, and acceptor, were forged. Plaintiff immediately sent notice to the defendants, in time for them to advise their indorser. The Court held, that the plaintiff was entitled to recover his money back, and said, "A bill is carried for payment to the person whose name appears as acceptor entirely as a matter of course. But it is by no means a matter of course to call upon a person to pay a bill for the honour of an indorser; and such a call, therefore, imports, on the part of the person making it, that the name of a correspondent, for whose honour payment is asked, is actually on the bill. The person thus called upon ought, certainly, to satisfy himself that the name of his correspondent is really on the bill; but still, his intention may reasonably be lessened by the assertion that the call itself makes to him *in fact*, though no assertion may be made in words. And the fault, if he pays on a forged signature, is not wholly and entirely his own, but begins, at least, with the person who thus calls upon him. And though, where all the negligence is on one side, it may, perhaps, be unfit to inquire into the quantum; yet, where there is any fault in the other party, and that other party cannot be said to be wholly innocent, he ought not, in our opinion, to profit by the mistake into which he may, by his own prior mistake, have led the other; at least, if the mistake be discovered before any alteration in the situation of any of the other parties; that is, whilst the remedies of all parties entitled to remedy are left entire, and no one is discharged by *laches*. We think the payment, in this case, was a payment by mistake, and without consideration, to a person not wholly free from blame. The striking out an indorsement by mistake cannot, in our opinion, discharge the indorser" (b).

Where bankers who had paid a forged bill gave notice of the forgery, and demanded the money by one o'clock in

(a) *Smith v. Mercer*, 6 Taunt. 76; 1 Marsh. 453; 16 R. R. 576. See, as to delay, *Pooley v. Browne*, 11 C. B., N. S. 566.

(b) *Wilkinson v. Johnson*, 3 B. & C. 428; 5 D. & Ry. 404; 27 R. R. 393.

the afternoon of the following day, the Court took time to consider, and at length unanimously held, that the money could not be recovered back. "In this case," they say, "we give no opinion upon the point, whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendants on the very day on which the bill was paid, so as to enable the defendants on that day to have sent notice to other parties on the bill. But we are all of opinion that the holder of a bill is entitled to know on the day when it became due, whether it is an honoured or dishonoured bill (c); and that if he receives the money, and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it. The holder, indeed, is not bound by law (if the bill be dishonoured by the acceptor) to take any other steps (except protest, or noting if the bill be a foreign bill) against the other parties to the bill till the day after the dishonour. But he is entitled to do so if he think fit; and the parties, who pay the bill, ought not by their negligence to deprive the holder of any right to take steps against the parties to the bill on the day when it becomes due" (d).

In an action on a bill alleged to be forged, the defendant may, without filing any affidavit, apply to the Court or a judge for a discovery on oath, or during the trial the judge may order the production, of any document to be dealt with as shall appear just (e).

(c) *Cocks v. Masterman*, 9 B. & C. 908; 33 R. R. 365. But if a banker, on whom a cheque is drawn, be also the banker of the holder, who pays in the cheque without any intimation of the character in which he desires the banker to receive it, whether as drawee, or as his, the holder's agent, it will be presumed that the banker took it as the agent of the holder, and therefore the banker may, in the course of the next day, inform the holder that there are no effects, and that the cheque will not be paid. *Boyd v. Emmerson*, 2 Ad. & Ell. 184; 4 N. & M. 99; *Ex parte Richdale*, L. R., 19 Ch. D. 409; *Kilsby v. Williams*, 5 B. & Ald. 815; 1 D. & C. 476;

24 R. R. 564; *Pollard v. Ogden*, 2 E. & B. 459.

(d) *Cocks v. Masterman*, 9 B. & C. 902; 33 R. R. 365; *Mather v. Lord Maidstone*, 18 C. B. 273; 25 L. J., C. P. 311; Code, s. 49 (12). Notice of dishonour may be given, but the right of action does not accrue till the whole of that day has expired. Code, s. 49 (12); *Kennedy v. Thomas*, [1894] 2 Q. B. 759.

(e) Ord. XXXI. rr. 12 and 14. Formerly an affidavit was generally required, *Thomas v. Dunn*, 6 M. & G. 274; though not invariably, *Woulner v. Derencour*, 9 Dowl. 672. In *Lewis v. Londesboro*, [1893] 2 Q. B. 191, the Court allowed the alleged forgeries to be photographed.

CHAPTER XXII.

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WITHOUT a limitation of actions no man can be secure in the enjoyment of his property. After the lapse of years, evidence is weakened or destroyed. And a claimant who has long slept on his demand has no right to complain, if, for the public advantage, it is at length taken from him. In practice it is found that no statutes are so useful as those of limitation, compelling, as they do, investigation, whilst the means of investigation subsist, and supplying the loss of those means, by a general act of settlement, applicable to each man's case.

CHAPTER
XXII.

Policy of the law.

Though an act of limitation, in respect of real property, was passed in this country in the year 1270, yet, partly from the comparatively inconsiderable amount of personal property, partly from the frequency of the sales in *market overt*, and partly from the circumstance that debts above 40s. were commonly secured by bond or single bill, and debts below that amount were not tried in the superior Courts, no limitation to personal actions was introduced till the year 1623, when the present Statute of Limitations, the 21 Jac. 1, c. 16 (supplemented by 3 & 4 Will. 4, c. 42), was passed.

When introduced.

The present statute.

The enactments of that statute, so far as they are applicable to our present purpose, are as follows (*a*):

By sect. 3, all actions on the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants), and all actions of debt, grounded on any lending or contract without specialty, must be brought within six years of the cause of such actions, and not after.

By sect. 4, if judgment for the plaintiff be arrested or reversed, or the defendant be outlawed and afterwards reverse the outlawry, the plaintiff, or his executor, may commence a new action within a year.

Sect. 7 provides, that if any person entitled to the action shall, at the time of the cause of action accrued, be, first, an

(*a*) The 3 & 4 Ann. c. 9, which by sect. 2 enacted that actions on notes must be brought within six years, is repealed by the Code. As, however, the Code has, so far as practicable, placed bills and notes and parties suing thereon on precisely the same footing, ss. 38 & 89, it seems hardly open to doubt that notes as well as bills, whether or not they did so before, fall within s. 3 of the 21 Jac. I. c. 16. The exception

of merchants' accounts was repealed by s. 9 of the 19 & 20 Vict. c. 97, and that of the plaintiff's absence beyond the seas or imprisonment by s. 10. Since the passing of the Married Woman's Property Acts a married woman would now probably be held discoverable as to any property or contract in respect of which she could sue as a *feme sole*. *Lowe v. Fore*, 15 Q. B. D. 667.

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infant ; secondly, feme covert ; thirdly, *non compos mentis* ; fourthly, imprisoned ; or, fifthly, beyond the seas, then such person may bring the action within six years after their full age, discoverture, sound memory, enlargement, or return from beyond the seas.

Division of
the subject.

In treating of the effect of this statute in its relation to bills and notes, we shall consider, 1, its general operation, and whether it destroys the debt or only bars the remedy ; 2, what actions or legal proceedings on those instruments it limits ; 3, from what period the statute begins to run ; 4, to what period the time of limitation is computed ; 5, how the statute may be avoided by issuing a writ and continuing it down ; 6, the proviso as to persons labouring under disabilities ; 7, what promises, acknowledgments, or payments will take a bill or note out of the statute ; 8, how the statute is to be taken advantage of ; and lastly, when, independently of the statute, lapse of time will be a bar to an action on a bill or note.

GENERAL
OPERATION
OF THE
STATUTE.

First, as to the general operation of the statute.

The Statute of Limitations is a good plea in equity as well as at law. It is also an answer to proof under a petition for adjudication in bankruptcy (*b*), and to a suit for seamen's wages (*c*).

Does not
destroy the
debt.

The Statute of Limitations does not destroy a debt, but only bars the remedy (*d*). Therefore, it must in all cases be pleaded, and could not be given in evidence, even under the plea of *nil debet*, or the replication of *nil debet* to a set-off (*e*). Therefore, also, a promissory note more than six years old, though not a good petitioning creditor's debt, *as against the bankrupt* (who may object that the remedy by a petition in bankruptcy as well as by action is taken away), is nevertheless a good petitioning creditor's debt as against strangers (*f*). "It is settled," said Lord Mansfield, "that the Statute of Limitations does not destroy the debt ; it only takes away the remedy ; the objection lies in the mouth of the bankrupt himself, but not in the mouth of

(*b*) *Ex parte Dewdney*, 15 Ves. 479.

(*c*) *Ewer v. Jones*, 6 Mod. 25 ; 4 Anne, c. 16, s. 17.

(*d*) As to an agreement not to rely on the statute, see *East India Company v. Paul*, 14 Jur. 253 ; 7 Moo. P. C. C. 85 ; *Lude v. Trill*, 6 Jur. 272 ; *Waters v. Thanes*, 2

Q. B. 757.

(*e*) *Chapple v. Durston*, 1 C. & J. 1, overruling the opinion of Lord Holt at Hertford Assizes, 1690 ; *Anon.*, 1 Salk. 278 ; *Draper v. Glassop*, 1 Ld. Raym. 153. Ord. XIX. r. 15.

(*f*) *Swaine v. Wallinger*, 2 Stra. 746.

a third person" (*g*). Therefore, again, the lien may be enforced (*h*), where an action for its amount would be barred by the statute.

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A foreign Statute of Limitations is no defence to an action on a foreign contract in the English Courts, unless it have the effect of extinguishing the contract, and the parties are living in the foreign country at the time of the extinction. For a Statute of Limitations usually affects the remedy merely, and not the construction of the contract (*i*).

Foreign
Statute of
Limitations.

Secondly, as to the actions and legal proceedings which the statute limits.

WHAT LEGAL
PROCEEDINGS
THE STATUTE
LIMITS.

It will be sufficient for the present purpose to remark that actions of debt and of assumpsit are limited to six years (*k*). Although the statute did not in terms apply to a proceeding in equity, Courts of equity adopted its provisions as a rule (*l*). "With regard to that statute," says Sir William Grant, "though it does not apply to any equitable demand, yet equity adopts it, or at least takes the same limitation, in cases that are analogous to those in which it applies in law (*m*). And now that equitable proceedings are commenced by action there is not even this verbal distinction. But the statute did not (prior to the Trustee Act, 1888, 51 & 52 Vict. c. 59, s. 8), bar a trust (*n*); nor prior to 3 & 4 Will. 4, c. 27, s. 40, did it bar a legacy (*o*). We have already seen that the statute is a bar in bankruptcy.

It is conceived, that if the statute have run out against the holder of a bill or note, payable at a day certain, and he then transfers it, the transferee's right of action is barred. For he, as transferee of an overdue bill, can stand

Effect of the
statute on the
title of a
subsequent
transferee.

(*g*) *Quantock v. England*, 5 Burr. 2628; 2 W. Bl. 703. See the same doctrine laid down by Lord Ellenborough and Bayley, J., in *Williams v. Jones*, 13 East, 450; 12 R. R. 401; and by the Court of Exchequer, in *Chapple v. Durston*, 1 C. & J. 1; 35 R. R. 669; *Maror v. Pyne*, 2 C. & P. 91.

(*h*) *Spears v. Hurlley*, 3 Esp. 81; 6 R. R. 814.

(*i*) *Huber v. Steiner*, 2 Bing. N. C. 202; 2 Scott, 304; *Harris v. Quine*, L. R., 4 Q. B. 653. See the Chapter on FOREIGN LAW.

(*k*) Sect. 3.

(*l*) *Johnson v. Smith*, 2 Burr. 961; *Prince v. Heylin*, 1 Atk. 493.

(*m*) *Starhouse v. Barnston*, 10 Ves. 466.

(*n*) *Heath v. Hanley*, 1 Ch. Ca. 20.

(*o*) *Anon.*, 2 Freem. 22. By that statute twenty years was the limit, now reduced to twelve years by the Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57, s. 8.

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in no better situation than his transferor. He, like his transferor, has a debt due to him, but has lost the right of action, and has notice of the loss of it (*p*). And, perhaps, as to the Statute of Limitations, the holder for the time being is a trustee of the action, so that prior or subsequent indorsees are, as between themselves and earlier parties, prejudiced by his laches (*q*).

WHEN IT
BEGINS TO
RUN.

Thirdly, as to the time from which the statute runs.

The Statute of Limitations begins to run on a bill or note as well as on any other contract, from the time that the right of action (*r*) first accrued to the party.

On a bill
payable after
date.

Therefore, on a bill payable at a certain period after date, the statute runs, not from the time the bill was drawn, but from the time when it fell due (*s*). And this is so also as to the account stated, of which the bill may be evidence (*t*).

Deliverable
on a con-
tingency.

So, where the maker of a note gave it to a third person, to be delivered to the payee after certain events should happen, the statute was held to run, not from the date of the note, but from the time of its delivery to the payee (*u*).

Payable by
instalments.

It is conceived that if a note be payable by instalments, and contain a provision that, if default be made in payment of one instalment, the whole shall be due, the statute runs from the first default against the whole amount of the note (*x*).

Against an
adminis-
trator.

And so in an action on a bill by an administrator, who had not taken out administration till after the bill became due, it was decided that the statute ran, not from the time the bill fell due, but from the time of granting letters of administration, for there can be no action till there is a party capable of suing (*y*).

(*p*) See *Scarpelini v. Atcheson*, 7 Q. B. 864.

(*q*) See *Webster v. Kirke*, 17 Q. B. 947.

(*r*) Though at that time an action and judgment would have been fruitless. *Emery v. Day*, 1 C., M. & R. 245; 4 Tyr. 695.

(*s*) *Wittersheim v. Lady Carlisle*, 1 H. Bl. 631.

(*t*) *Fryer v. Roe*, 12 C. B. 437.

(*u*) *Savage v. Aldren*, 2 Stark. 232; 19 R. R. 707.

(*x*) See *Hemp v. Garland*, 4 Q. B. 519; *Reeres v. Butcher*, [1891] 2 Q. B. 509.

(*y*) *Murray v. East India Company*, 5 B. & Al. 204; 24 R. R. 325. But this interval is now to be computed where the administrator claims a chattel real; 3 & 4 Will. 4, c. 27, s. 6. The statute runs against an executor from the time the bill falls due, for he can commence an action before probate.

As upon a bill drawn payable after sight, there is no right of action till presentment; so without such presentment the statute does not begin to run (*z*). If a note be payable at a certain period after sight (*a*), the statute runs from the expiration of that period, after the exhibition of the note to the maker.

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On a bill
after sight.

But we have seen, that if a bill or note be payable "at sight" or "on demand," those words are held not to constitute a condition precedent, but merely to import that the debt is due and payable immediately (*b*); or, at any rate, an action is sufficient demand. Therefore on a bill or note payable on demand, unless the note be accompanied by some writing restraining or postponing the right of action, the statute runs from the date of the instrument, or date of delivery if that be delayed, and not from the time of the demand (*c*). Where a note payable on demand was given to a bank, accompanied by an agreement that the note should be held as a security for advances, the Court of Exchequer decided, in *Hartland v. Jukes*, that the statute did not begin to run against the note till after advances made, and a claim made as for a debt. The learned judge, however (Mr. Baron Martin), who tried the case, appears to have thought otherwise, or, at least, to have doubted. Where a loan was made by a cheque, the statute was held to run, not from the date of the cheque, but from the time the cheque was cashed (*d*).

On demand.

(*z*) *Holmes v. Kerrison*, 2 Taunt. 323; 11 R. R. 594.

(*a*) *Sturdy v. Henderson*, 4 B. & Al. 592; *Sutton v. Toomer*, 7 B. & C. 416; 1 M. & Ry. 125; *Holmes v. Kerrison*, 2 Taunt. 323; 11 R. R. 594; and see *Dixon v. Nuttall*, 1 C., M. & R. 307; 6 C. & P. 320.

(*b*) *Capp v. Lancaster*, Cro. Eliz. 548; *Rumball v. Ball*, 10 Mod. 38; *Collins v. Benning*, 12 Mod. 444; *M'Intosh v. Haydon*, Ry. & M. 363; 27 R. R. 757; ante, pp. 91, 283, 293.

(*c*) *Christie v. Fonsick*, Sel. N. P. 9th ed. 351. This case is said to have been overruled in K. B., *sed quere*. If, indeed, a bond is conditioned to be void on payment on demand, a demand must be proved, or the bond is not forfeited. *Carter v. Ring*, 3 Camp. 459; 14 R. R. 808. In *Meggison*

v. Harper, 2 C. & M. 322; 4 Tyr. 94, it was assumed that the statute ran from the date of the note, which was payable on demand. *Quere tamen*, if the note be a re-issuable one, and re-issued, or if it be payable at a particular place; and see p. 290.

(*d*) 32 L. J. 162; *Garden v. Bruce*, L. R., 3 C. P. 300; 37 L. J. 112. It was formerly thought that all parties alike to an instrument payable on demand, drawer or indorser, as well as acceptor or maker, were liable thereon as of the date; but the tendency of modern cases seems to apply a different rule to drawers and indorsers. In *Ex parte Boyse*, 33 Ch. D. 612; 56 L. J. 135; it was held that the statute on a bill at sight did not begin to run in favour of the drawer till presentment; and in

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demand.

If a note is made payable at a certain period *after demand*, it is like a note payable after sight; the demand and the lapse of the specified time after the demand are conditions precedent, and the statute runs from the time when the note falls due (*e*). And if a bill be made payable twelve months *after notice*, the statute does not begin to run till after notice and the twelve months subsequent (*f*).

In case of
fraud.

It was at one time suggested that where the plaintiff had been the subject of fraud, he might by a special replication avoid a plea of the statute, and postpone its application (*g*). It was afterwards, however, settled that such a replication was bad (*h*); though possibly the fraudulent concealing of a cause of action on the part of a defendant till the plaintiff's remedy is gone, may constitute a substantive ground of action. And now the rule of equity would prevail against the statute in such a case (*i*).

In the case of
an accommo-
dation bill.

Upon the contract which the law implies to indemnify an accommodation acceptor, it has been held that the statute begins to run from the time at which the plaintiff is damnified by actual payment (*k*).

Where there
has been both
non-accept-
ance and non-
payment.

If a bill be dishonoured by non-acceptance, and afterwards by non-payment, the statute runs from the refusal to accept (*l*).

the case of a cheque where a letter notifying countermand of payment had been sent (presentment being therefore excused) the statute was held to run in favour of the drawer from the receipt of that letter. *Ex parte Bethell*, 34 Ch. D. 561; 56 L. T. 334. In America, the Supreme Court laid down absolutely in *Bull v. Bank of Kasson*, 123, Supreme Court; 16 Davis, 105; that the statute ran in favour of the drawer from the demand. If this be so, the holder of a cheque may, it would seem, present any time within six years to preserve his right against the drawer, and then has six years more within which to bring his action.

(*e*) *Thorpe v. Booth*, Ry. & M. 388.

(*f*) *Clayton v. Gosling*, 5 B. & C. 360; 8 D. & Ry. 110.

(*g*) *Southsea Company v. Wy-*

mondsell, 3 P. Wms. 143; *Bree v. Holbeck*, Doug. 630; *Clark v. Hougham*, 2 B. & C. 149; 3 D. & Ry. 322; *Ex parte Bolton*, 1 Mont. & Ayr. 60; *Granger v. George*, 5 B. & C. 149; 29 R. R. 196; *Browne v. Howard*, 2 B. & B. 73.

(*h*) *Imperial Gas Company v. London Gas Company*, 10 Exch. 39. Even as an equitable replication at law. *Hunter v. Gibbons*, 1 H. & N. 459.

(*i*) See *Gibbs v. Guild*, 51 L. J., Q. B. 313; L. R., 9 Q. B. D. 59; and view of Holker, L.J. Though, even where fraud postpones the statute, the maxim "*Vigilantibus*," &c., applies. *Denys v. Shuckburgh*, 4 Y. & C. 42.

(*k*) *Reynolds v. Doyle*, 1 M. & G. 753; *Collinge v. Heywood*, 9 Ad. & E. 633; but see *Webster v. Kirk*, 17 Q. B. 944.

(*l*) *Whitehead v. Walker*, 9 M. & W. 506.

Fourthly, as to the period up to which the time of limitation is computed.

The words of the statute 21 Jac. 1, c. 16, s. 3, are all actions of trespass, &c., shall be *commenced* and sued within six years, &c.

Therefore, when, according to the old practice, writs bore *teste* of a day before the day of issuing them, it was held, that the time within which the action should be brought must be computed not to the *teste* but to the issuing of the writ (*m*).

At present no difficulty on this subject can exist, as the *date* and *teste* of a writ are the same (*n*).

Where an action is commenced in an inferior Court, and removed into a superior Court, the time of limitation is to be computed only to the commencement of the action in the inferior Court (*o*).

To bar a set-off, the six years must have expired before action brought (*p*).

When the statute once begins to run, it never stops, except in the cases mentioned in the fourth section, although circumstances should arise in which it is impossible to sue, as if, for example, the debtor die before action, and no executor be appointed (*q*).

But where an action has been commenced in time, and then the plaintiff dies, and the period of limitation has expired, the courts, by a strained construction of the statute, have allowed the personal representative to commence another action within a year from the plaintiff's death.

And where the defendant died, a year was also given, and a year from the grant of administration where there was no executor. In the case of the defendant's death, the allowance of a year rested not only on the analogy to the case of a plaintiff, but also upon the general rule that where an action abated by the act of God, the same plaintiff might have a new writ by journeys' accounts (*r*). But now the action is not abated by marriage, death or bankruptcy of any party, if the cause of action survives, but the successor

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UP TO WHAT
PERIOD THE
TIME OF
LIMITATION
IS COM-
PUTED.

Death of
parties after
action.

(*m*) *Johnson v. Smith*, 2 Burr. 950.

(*n*) R. S. C. 1883, Ord. II. rr. 1, 2, 8, App. A, Part I., Forms 1—4.

(*o*) *Berin v. Chapman*, 1 Sid. 228; *Matthews v. Phillips*, 2 Salk. 424.

(*p*) *Walker v. Clements*, 15

Q. B. 1046.

(*q*) *Rhodes v. Smethurst*, 4 M. & W. 42; affirmed in error, 6 M. & W. 351.

(*r*) *Curlewis v. Lord Mornington*, in error, 27 L. J., Q. B. 439; *Swindell v. Bulkeley*, 18 Q. B. D. 250.

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in interest, or such other parties as the Court or a judge think fit, may be joined (*s*).

HOW THE
OPERATION
OF THE
STATUTE IS
OBTAINED BY
ISSUING A
WRIT.

Fifthly, as to the mode in which the operation of the statute may be obviated by issuing a writ and continuing it down.

The practice is now regulated by Ord. VIII. r. 1, a writ being in force for twelve months, and a renewed writ for six months from date of renewal.

Prior to 1852 a bill in equity, filed by one creditor on behalf of himself and the other creditors, would prevent the Statute of Limitations from running against any of the creditors who come in under the decree (*t*).

THE SAVING
CLAUSE.

Sixthly, as to the saving clause in favour of infants, married women, lunatics, persons imprisoned or beyond seas.

Infants.

An infant would have been bound had he not been expressly excepted (*u*). For infants may, during the six years, sue by their next friends (*x*). An infant *cestui que trust* is bound by the *laches* of his trustee, even in equity (*y*).

Imprison-
ment.

The plaintiff's imprisonment or absence beyond seas now no longer postpones the running of the statute (*z*).

Defendant's
absence
beyond seas.

The *defendant's* absence beyond seas was not a case within the 24 Jac. 1, c. 16 (*a*), though one in which the saving was much more necessary than when the plaintiff himself was absent, as an absent plaintiff might sue a defendant in England, but a defendant beyond seas could not formerly have been sued in England at all. To remedy this hardship, the statute 4 & 5 Anne, c. 16, s. 19, enacts, that if at the accruing of the action the defendant be beyond the seas, the plaintiff may bring his action within six years after the defendant's return. A mere setting foot on English ground is not a return within the statutes (*b*). If one of several *co-defendants*, in an action *ex contractu*, were abroad, the Statute of Limitations did not begin to run

(*s*) Ord. XVII. rr. 1—4.

(*t*) *Sterndale v. Hankinson*, 1 Sim. 393. But now since 15 & 16 Vict. c. 86, s. 45, it has no such effect. See judgment of Jessel, M.R., in *Naylor v. Blunt*, 27 W. R. 865; and *In re Greaves*, 18 Ch. D. 551.

(*u*) *Prideaux v. Webber*, 1 Lev. 31.

(*x*) *Chandler v. Vilett*, 2 Saund. 121, a.

(*y*) *Wyeh v. East India Company*, 3 P. Wms. 309.

(*z*) 19 & 20 Vict. c. 97, s. 10.

(*a*) *Hull v. Wyborn*, 1 Show. 98; *Swayn v. Stephens*, Cro. Car. 333.

(*b*) *Gregory v. Hurrill*, 1 Bing. 24; 8 Moore. 189.

against any of them (*c*). But the Statute 19 & 20 Vict. c. 97, s. 11, preserves the protection of the statute to such of the defendants as were within seas at the time of action accrued.

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When a disability is removed, and the statute once begins to run, no supervening disability will stop it (*d*).

Successive
disabilities.

Seventhly, as to the promises, acknowledgments, or payments, which take a bill or note out of the statute.

WHAT
ACKNOWLEDGMENTS
WILL TAKE
A DEBT OUT
OF THE
STATUTE.

It was at first held, that nothing short of an express promise would take a debt out of the statute (*e*); then that a mere acknowledgment would, as evidence of a promise; and that a part payment of principal or interest amounted to an acknowledgment (*f*). The effect of these decisions was nearly to repeal the statute. Their consequences were somewhat restrained by the case of *Tanner v. Smart* (*g*), in which it was decided that a new promise or acknowledgment did not operate by drawing down the original promise to a subsequent date, but by giving a new cause of action; and that the promise stated in the replication is to be considered as the promise laid in the declaration, and must be consistent with it.

At length, further to restrain the mischief, a very eminent Lord Chief Justice of the King's Bench introduced the Act 9 Geo. 4, by which it is enacted (*h*), that no acknowledgment or promise *by words only* shall take a case out of the statute, unless in writing, and signed by the party chargeable.

Lord Tenterden's Act.

That where there are several joint contractors or executors one shall not lose the benefit of the statute through a written acknowledgment signed by the other, but the plaintiff shall recover against the acknowledging party only.

That the effect of *payment* of principal or interest, by any person, shall remain as before the statute (*i*).

(*c*) *Fannin v. Anderson*, 7 Q. B. 811; *Towns v. Mead*, 16 C. B. 123; *Forbes v. Smith*, 24 L. J., Exch. 299; 10 Exch. 717; and see *Forbes v. Smith*, 11 Exch. 161. As to what is evidence for the jury of a person not having been in England, see *Koch v. Shepherd*, 18 C. B. 191.

(*d*) *Doe d. Durore v. Jones*, 4 T. R. 310; 2 R. R. 390; *Smith v.*

Hill, 1 Wils. 134; *Gray v. Mendez*, 1 Stra. 556; *Rhodes v. Smethurst*, 4 M. & W. 42; 6 M. & W. 351, in error.

(*e*) *Dickson v. Thomson*, 2 Show 126.

(*f*) *Hollis v. Palmer*, 2 Bing. N. C. 713; 3 Scott. 265.

(*g*) 6 B. & C. 603.

(*h*) Cap. 14, s. 1.

(*i*) See 19 & 20 Vict. c. 97, s. 14.

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the subject.

In considering the operation of this and other parts of the Act 9 Geo. 4, c. 14, on the 21 Jac. 1, c. 16, in respect of acknowledgments, promises, or payments as to bills or notes otherwise barred by the Statute of James, we shall inquire first, what sort of an acknowledgment, promise, or payment it must be to take a debt out of the statute; secondly, at what time it must be made; thirdly, by whom; fourthly, to whom; and, lastly, by what evidence it must be proved.

Of what sort.

First as to the sort of acknowledgment, promise, or payment which will save the statute.

An acknowledgment, before the 9 Geo. 4, c. 14, must have been such an acknowledgment as implies a promise to pay, and must be so still. "That statute," says Tindal, C.J., "did not intend, as it appeared to us, to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof, substituting the certain evidence of a writing signed by the party chargeable instead of the insecure and precarious testimony to be derived from the memory of witnesses" (*k*). Therefore, the acknowledgment must not be accompanied with expressions repelling the inference of a promise to pay (*l*); accordingly a letter written without prejudice will not suffice (*m*); and if a payment be made, accompanied by expressions which render the intention of the payment doubtful, then the meaning of any such expressions is a question of fact for a jury (*n*). If the promise be conditional, the condition must be shown to have been performed (*o*). "There must," says Rolfe, B., "be a *promise* to pay; but from a simple acknowledgment the law implies a promise" (*p*). It is sufficient if the

(*k*) *Haydon v. Williams*, 7 Bing. 166; 4 M. & P. 811; 33 R. R. 415.

(*l*) *Fearn v. Lewis*, 6 Bing. 349; 4 M. & P. 1; 31 R. R. 434; *Scals v. Jacob*, 3 Bing. 638; 11 Moore, 553; *Ayton v. Bolt*, 4 Bing. 105; 12 Moore, 305; *Kennett v. Milbank*, 8 Bing. 38; 1 M. & Scott, 102; *Brigstock v. Smith*, 1 C. & M. 483; 38 R. R. 676; *Spong v. Wright*, 9 M. & W. 629; *Cawley v. Turnell*, 12 C. B. 291; *Smith v. Thorne*, 18 Q. B. 134; *Rackham v. Marriott*, 25 L. J., Exch. 324; 1 H. & N. 234; *Goate v. Goate*, 1 H. & N. 29; *Cornforth v. Smithard*, 5 H. & N. 13; 29

L. J., Exch. 228; *Everett v. Robertson*, 1 E. & E. 16; *Collinson v. Margesson*, 27 L. J., Exch. 305; *Godwin v. Culley*, 4 H. & N. 373.

(*m*) *Ex parte Mitchell*, L. R., 6 Chan. Ap. 823.

(*n*) *Wainman v. Kynman*, 1 Exch. 118.

(*o*) *Tanner v. Smart*, 6 B. & C. 603; 9 D. & R. 549; 30 R. R. 461; *Chasemore v. Turner*, L. R., 10 Q. B. 500.

(*p*) *Hart v. Prendergast*, 14 M. & W. 741; *Williams v. Griffith*, 18 L. J., Exch. 210; 3 Exch. 335; *Phillips v. Phillips*, 3 Hare, 299; *Buckmaster v. Russell*, 4 L. T. (N. S.) 552; *Lec v. Wilmot*,

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acknowledgment or promise ascertain, either expressly or by reference, the amount due (*q*), or if it leave the amount to be supplied by parol evidence. Where, in an action against the acceptor of a bill of exchange, to take the case out of the statute, a letter by the defendant, promising "to pay the balance," was produced, but the letter did not specify its amount, the plaintiff was held entitled to recover nominal damages (*r*).

The date of a letter acknowledging a debt may be supplied by parol evidence (*s*).

Evidence of date.

The construction of an ambiguous written document given in evidence, to save the statute, is for the Court, and not for the jury (*t*).

Construction.

Where there was a mutual and running account between the plaintiff and the defendant, any item on either side within six years would formerly have taken the whole account out of the statute, but an item in an account not mutual would not (*u*). But since Lord Tenterden's Act there must be either payment by the defendant, or a signed acknowledgment (*x*).

Mutual running account.

An account once stated is within the statute (*y*).

35 L. J., Ex. 175; L. R., 1 Ex. 364. But the acknowledgment must be made for the purpose of recognizing the debt. An acknowledgment made in other affairs and *alio intuitu* is not sufficient. *Cockerill v. Sparke*, 1 H. & Colt. 699; *Everett v. Robertson*, 1 E. & E. 16; *Rowe v. Hopwood*, 38 L. J., Q. B. 1; L. R., 4 Q. B. 1. The debt is the consideration; but other good considerations, as forbearance to sue, will support the promise. *Wilbye v. Elgee*, L. R., 10 C. P. 497. As to sufficient acknowledgment, see the recent case of *Green v. Humphreys*, 53 L. J., Ch. 625; 26 Ch. D. 474, in C. A.

(*q*) *Lechmere v. Fletcher*, 1 C. & M. 623; 38 R. R. 688. The amount may be ascertained by extrinsic evidence. *Bird v. Gammon*, 3 Bing. N. C. 883; 5 Scott, 213; *Waller v. Lucy*, 1 M. & Gr. 54. A letter from the debtor asking for an account bars the statute. *Quincy v. Sharp*, 1 Ex. D. 72; *Skert v. Lindsay*, 2 Ex. D. 314.

(*r*) *Dickinson v. Hatfield*, 1 M. & Rob. 141; 5 C. & P. 46; see *Kennett v. Milbank*, 8 Bing. 38; 1 M. & Scott, 102.

(*s*) *Edmunds v. Downes*, 2 C. & M. 459; 39 R. R. 813.

(*t*) *Morrell v. Frith*, 3 M. & W. 402. But it is a general rule, that parol evidence is admissible to explain technical terms in mercantile instruments, though the construction of the instrument is for the Court; *ibid.* *Bowman v. Horsey*, 2 M. & Rob. 85; see, too, *Bourdin v. Greenwood*, L. R., 13 Eq. 281; 41 L. J. 73.

(*u*) *Hothery v. Munnings*, 1 B. & Ad. 15; *Cotes v. Hurris*, Bulls N. P. 149; *Cranch v. Kirkman*, 1 Peake, 164; *Catling v. Skoulding*, 6 T. R. 193.

(*x*) *Williams v. Griffiths*, 2 C., M. & R. 45. The exception of merchants' accounts applied only to an action of account, or to an action on the case for not accounting. *Inglis v. Haigh*, 8 M. & W. 769. 19 & 20 Vict. c. 97, s. 9.

(*y*) *Farrington v. Lee*, 1 Mod.

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Devise.

A devise, in trust, to pay a particular creditor, will take a debt out of the statute in equity. But a devise for the payment of debts in general will not revive a debt if the statute has run out (*z*), but will, in equity, prevent the statute from running out (*a*). And Lord Brougham held, reversing a contrary decision of Sir John Leach, M.R., that a bequest of personal estate for the payment of debts will have the same effect (*b*).

Acknowledgment by executors.

As a debt due from a testator's estate may exist, and yet the executor not be liable to pay, a mere acknowledgment of a debt by an executor is not sufficient to take a debt out of the statute; there must be an express promise (*c*). And it seems that a part payment by one executor will not take the case out of the statute as against his co-executor (*d*).

Notice in newspapers.

It seems that a notice in a newspaper, by a personal representative, that he will pay all debts justly due from his testator, will prevent a debt from being barred by the Statute of Limitations (*e*).

Part payment.

A part payment must appear to be the payment of a debt, of the debt for which the action is brought, and a part payment of a larger sum (*f*). "The principle," says Parke, B., "upon which part payment takes a debt out of the statute is that it admits a greater debt to be due at the time of the part payment. Unless it amounts to the admission that more is due, it cannot operate as an admission of any still existing debt" (*g*).

268; *Renew v. Axton*, Carth. 3; *Chierly v. Bond*, 4 Mod. 105; *Tickell v. Short*, 2 Ves. sen. 239.

(*z*) *Burke v. Jones*, 2 Ves. & B. 275; 13 R. R. 83; *Gulliver v. Gulliver*, 1 H. & N. 174.

(*a*) *Hughes v. Wynn*, 1 Turn. & R. 307; *Hargreaves v. Mitchell*, 6 Madd. 326; 23 R. R. 231; *Moore v. Petchell*, 22 Beav. 172; *Jacquet v. Jacquet*, 27 Beav. 332.

(*b*) *Jones v. Scott*, 1 Russ. & M. 255; 32 R. R. 210. But see *Spong v. Wright*, 9 M. & W. 629.

(*c*) *Tulloch v. Dunn*, R. & Moo. 416; 27 R. R. 765; and see *Atkins v. Tredgold*, 2 B. & C. 23; 3 D. & Ry. 200; 26 R. R. 254; *Fordham v. Wallis*, 22 L. J., Chan. 548.

(*d*) *Scholey v. Walton*, 12 M. & W. 510.

(*e*) *Jones v. Scott*, 1 Russ. & M. 253; 32 R. R. 210.

(*f*) *Tippetts v. Heane*, 1 C., M. & R. 252; 4 Tyr. 772. But the sum need not then be ascertained. *Walker v. Butler*, 25 L. J., Q. B. 377; 6 E. & B. 506. In *Burn v. Boulton*, 15 L. J., C. P. 97; 2 C. B. 476, it was held that there was a difference between a debt on a promissory note, and a debt on a *quantum meruit*. That, therefore, if a payment is made, less than the amount of the note, it need not be proved by any expressions at the time of payment to be a part payment; and see *Worthington v. Grimsditch*, 7 Q. B. 479.

(*g*) *Worthington v. Grimsditch*, 7 Q. B. 479. See *Gowan v. Forster*, 3 B. & Ad. 510.

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Where a debtor owes his creditor some debts from a period longer than six years, and others from a period within six years, and pays a sum without appropriating it to any particular debt, such payment is not a payment on account, to take out of the Statute of Limitations the debts due longer than six years, but the creditor may at any time apply such payments to the debts due longer than six years (*h*).

Appropriation of payments.

Giving a bill is sufficient as a payment or acknowledgment to obviate the statute (*i*). But drawing the bill is payment or acknowledgment at the time of the drawing, and not at the time of the payment by the drawee (*k*).

Payment by bill.

Goods treated as money are a sufficient payment (*l*).

Payment by goods.

An acknowledgment required by the 9 Geo. 4, c. 14, is by the eighth section of that Act exempted from stamp duty, to which it would otherwise have been subject, as an agreement (*m*). But if it amount to a promissory note, the exempting clause does not apply, and a stamp is necessary (*n*).

Stamp on acknowledgment.

A mere parol statement of an antecedent debt, without any new contract or consideration made within six years before action brought, does not constitute a sufficient cause of action to prevent the operation of the Statute of Limitations (*o*). But where there are cross demands of which there is a mutual settlement by the statement of a balance, the case is taken out of the statute, because, as observed by Mr. Baron Alderson (*p*), "the truth is, that the going

Statement of account.

(*h*) *Mills v. Fowkes*, 5 Bing. N. C. 455; 7 Scott, 444; *Waller v. Lacy*, 9 L. J. C. P. 217; 1 Scott, 186; 1 M. & Gr. 54; *Nash v. Hodgson*, 1 Kay, 650; 23 L. J., Chan. 780; but see 25 L. J., Chan. 186; 6 De G., M. & G. 474, and ante, p. 304.

(*i*) *Turney v. Dodwell*, 3 E. & B. 136; *Irring v. Veitch*, 3 M. & W. 90.

(*k*) *Gowan v. Forster*, 3 B. & Ad. 507.

(*l*) *Hart v. Nash*, 2 C. M. & R. 337; *Hooper v. Stevens*, 7 C. & P. 260; 4 Ad. & E. 71; 5 N. & M. 635; 1 Har. & W. 480; and see as to the evidence, *Moore v. Strong*, 1 Bing. N. C.

441; *Bodyer v. Archer*, 10 Exch. 333.

(*m*) *Morris v. Dixon*, 4 Ad. & E. 845; 6 N. & M. 438; Stamp Act, 1891, s. 1.

(*n*) *Jones v. Ryder*, 4 M. & W. 32; *Holmes v. Mackrell*, 3 C. B. N. S. 789; *Parmiter v. Parmiter*, 30 L. J., Ch. 508, per Lord Campbell.

(*o*) *Jones v. Ryder*, 4 M. & W. 32, overruling *Smith v. Forty*, 4 C. & P. 126.

(*p*) *Ashby v. James*, 11 M. & W. 542; *Worthington v. Grimsditch*, 7 Q. B. 479; *Pott v. Clegg*, 16 M. & W. 327; 16 L. J., Exch. 210.

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through an account, with items on both sides, converts the set-off into payments" (q).

Payment of interest.

Payment of interest is, in general, sufficient to take the principal out of the statute (r), but a payment of principal (except in the case of bills or notes) will not revive a claim for interest (s).

When the acknowledgment must be made.

Secondly, as to the time when the acknowledgment must be made.

Except in the cases which have been mentioned of devises and bequests for the payment of debts, it makes no difference whether the promise, acknowledgment, or payment were made before or after the expiration of six years. An acknowledgment which prevents the running out of the statute will also revive a debt already barred.

Must be made before action brought.

It was formerly held that the acknowledgment might be after action brought (t). But as the acknowledgment is now considered as the ground of action and the subject of the declaration, the promise, acknowledgment, or payment must clearly be before action brought (u).

Payment of money into Court.

Payment of money into Court will not take a bill or note out of the statute, except as to the amount paid in (x).

By whom.

Thirdly, as to the person by whom the promise, acknowledgment, or payment may be made.

It may be made by an agent (y), and therefore by a wife

(q) *Bodyer v. Archer*, 10 Exch. 333; *Amos v. Smith*, 31 L. J., Exch. 423; *Worthington v. Grimsditch*, 7 Q. B. 479. See, however, *Clark v. Alexander*, 13 L. J., C. P. 133. One item only is enough. *Knowles v. Mitchell*, 13 East, 249; *Highmore v. Primrose*, 5 M. & S. 65. See *Lemere v. Elliott*, 6 H. & N. 656.

(r) *Purdon v. Purdon*, 10 M. & W. 562; *Bamfield v. Tupper*, 7 Exch. 27; *Maber v. Maber*, 36 L. J., Ex. 70; L. R., 2 Ex. 153; but not necessarily so; *Morgan v. Rowlands*, L. R., 7 Q. B. 493; 41 L. J., 187, where payment of interest was made under pressure of legal process.

(s) *Collier v. Willock*, 4 Bing. 313; 12 Moore, 557; *Beuly v.*

Greenslade, 2 C. & J. 61.

(t) *Yea v. Fouraker*, 2 Burr. 1099; *Lloyd v. Maund*, 2 T. R. 760; *Rucker v. Hannay*, 4 East, 604, n.

(u) *Tanner v. Smart*, 6 B. & C. 603; 9 D. & R. 549; 30 R. R. 461; *Rew v. Pettet*, 1 Ad. & E. 196; 3 N. & M. 456; *Bateman v. Pinder*, 3 Q. B. 574.

(x) *Rrid v. Dickons*, 6 B. & Ad. 499; 2 N. & M. 369; and see *Long v. Greville*, 3 B. & C. 10; 4 D. & R. 632.

(y) *Burt v. Palmer*, 5 Esp. 145; 10 R. R. 707, n. But an acknowledgment in writing, signed by an agent, has been held insufficient. *Hyde v. Johnson*, 2 Bing. N. C. 776; 3 Scott, 289. *Sed quære*. This case, however, has been several

acting as agent (*z*), and by one partner even after dissolution of the partnership (*a*), if he makes a payment. But if an agent exceed his authority in making the payment it will not take the debt out of the statute (*b*). It may be made by an infant for necessities (*c*). Payment of interest by an indorser of a promissory note does not take the note out of the statute as against the maker (*d*).

The 9 Geo. 4, c. 14, introduced, as we have seen, a distinction between acknowledgments and promises *by words only* (*e*), and payments. The former, in the case of joint contracts, affected only the party acknowledging; the latter retained their former effect. But this distinction was abolished by the 19 & 20 Vict. c. 97, s. 14, which statute restrains the effect of the acknowledgment implied from payment and confines it to the party making it, as the 9 Geo. 4, c. 14, had restrained the effect of an express acknowledgment. But the statute is not retrospective (*f*).

By joint
contractors.

Statute
19 & 20 Vict.
c. 97.

It has been held, that payment of a dividend under a commission of bankruptcy against one of two makers of a joint and several note would take the note out of the statute against the solvent maker (*g*). But that is doubtful, for it was afterwards more correctly held that payment of a dividend by the assignees of an insolvent would not take a note out of the statute as against his co-makers, for there is no acknowledgment of more being due (*h*).

In cases of
bankruptcy
and insol-
vency.

times recognized, and a question has even been made whether a written acknowledgment, signed by one of several partners in trade, has any other effect than an acknowledgment by one of several ordinary joint contractors. *Clark v. Alexander*, 13 L. J., C. P. 133. But now by 19 & 20 Vict. c. 97, s. 13, the signature of an agent suffices.

(*z*) Evidence of admissions by an agent may be admissible without calling the agent. *Paethorpe v. Furnish*, 2 Esp. 511; *Anderson v. Saunderson*, 2 Stark. 204; Holt, N. P. C. 591; 17 R. R. 681; 19 R. R. 703; *Gregory v. Parker*, 1 Camp. 394; 10 R. R. 712; but see *Gibson v. Baghott*, 5 C. & P. 211.

(*a*) *Wood v. Braddick*, 1 Taunt. 104; 9 R. R. 711.

(*b*) *Linsell v. Bousor*, 2 Bing. N. C. 241; 2 Scott, 399.

(*c*) *Willins v. Smith*, 4 E. & B.B.E.

B. 180.

(*d*) *Harding v. Edgcumbe*, 28 L. J., Exch. 313.

(*e*) As to the effect of an acknowledgment by an executor, see *Fordham v. Wallis*, 22 L. J., Chan. 548. See *Emery v. Day*, 1 C., M. & R. 249; 4 Tyr. 695.

(*f*) *Jackson v. Woolley*, 27 L. J., Q. B. 448. This statute had been held to be retrospective, and to take away the effect of a payment by a joint contractor as against his companion, though made before the statute. *Thompson v. Waithman*, 26 L. J., Chan. 134; *Jackson v. Woolley*, 27 L. J. Q. B. 181.

(*g*) *Davies v. Edwards*, 21 L. J., Exch. 4.

(*h*) *Jackson v. Fairbank*, 2 H. Bl. 340, recognized in *Perham v. Raynal*, 2 Bing. 306; 9 Moore, 556; but see *Brandram v. Wharton*, 1 B. & Al. 463; 19 R. R. 354, 357.

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To whom.

Fourthly, as to the person to whom the acknowledgment, promise, or payment must be made.

It has been held, that the acknowledgment or promise need not, in point of fact, be made to the plaintiff, but may be made to a stranger (*i*). Therefore, a letter by one joint and several maker of a promissory note to another has been decided to take the note out of the statute as against the writer (*k*); and from the cases there cited, it should seem it would, before the 9 Geo. 4, c. 15, have had the same effect as against the other maker to whom it was addressed. So also, in an action by indorsees against acceptors of a bill, a deed between the acceptors and third persons, reciting that the bill was outstanding and unpaid, was held to take it out of the statute (*l*). So an acknowledgment to the holder of a bill or note, enures to the benefit of a subsequent holder (*m*). So a payment to an administrator, under void letters of administration, will take a note out of the statute in an action by an administrator under valid letters (*n*).

What evidence is required of the acknowledgment.

Lastly, as to the evidence by which a promise, acknowledgment, or payment must be proved, in order to its taking a debt out of the statute.

Where the same debt is secured by different instruments, payment of interest on one will take the others out of the statute (*o*).

Signature of party chargeable.

The statute 9 Geo. 4, c. 14, requires that an acknowledgment or promise *by words only* should be in writing, signed by the party chargeable (*p*).

Effect of verbal admission.

It was formerly held, that a promise or payment could not be proved by a verbal or unsigned written acknowledgment (*q*). But it was also held, that the appropriation

(*i*) *Peters v. Brown*, 4 Esp. 46. As to payment to an agent of the holder, see *Meggison v. Harper*, 2 C. & M. 322; 4 Tyr. 94; 39 R. R. 784.

(*k*) *Halliday v. Ward*, 3 Camp. 32.

(*l*) *Mountstephen v. Brooke*, 1 B. & Ald. 224.

(*m*) *Gale v. Capern*, 1 Ad. & Ell. 102; 3 N. & M. 863; see, however, *Cripps v. Davis*, 12 M. & W. 159. But not a part payment to one who is no longer the holder, *Stamford Bank v. Smith*,

[1892] 1 Q. B. 765; 61 L. J. 405.

(*n*) *Clark v. Hooper*, 10 Bing. 480; 4 Moore & S. 353; 38 R. R. 508.

(*o*) *Dowling v. Ford*, 11 M. & W. 329.

(*p*) See ante, p. 363.

(*q*) *Willis v. Newham*, 3 Y. & J. 518; *Baildon v. Walton*, 1 Exch. 632; *Waters v. Tompkins*, 2 C., M. & R. 723; 1 Tyr. & Gr. 137; *Bayley v. Ashton*, 4 P. & D. 204; *Maghee v. O'Neil*, 7 M. & W. 531; see, however, *Eastwood v. Saville*, 9 M. & W. 615.

of the payment to a particular debt might (*r*). Payment may, however, now be proved like any other fact (*s*).

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This part of the statute is retrospective, and therefore an oral acknowledgment or promise, though made before 1st January, 1829, when the statute came into operation, became inadmissible in evidence (*t*).

Statute
retrospective.

Entries on the bill, of payment of interest or principal, in the handwriting of the plaintiff, were formerly evidence to take the debt out of the statute; but now the 9 Geo. 4, c. 14, s. 3, enacts that no indorsement or memorandum of any payment, written or made after the 1st January, 1829, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the statute. It may now, therefore, be advisable that any indorsement of payment of interest, or part payment of principal, should be written by the debtor and signed by both parties; signed by the creditor, as evidence in favour of the debtor; written and signed by the debtor, to keep the security alive in favour of the creditor.

Entries on
the bill.

Indorsements of the payment of interest are presumed to have been written at the time they bear date (*u*).

As an entry by a person deceased against his interest is evidence in an action brought by his personal representatives, such an entry of payment of interest is admissible in an action by them on a bill or note for the purpose of proving payment. But if the entry be on the bill or note itself, payment so proved, though admissible, would not by the express words of the statute be sufficient to take the debt out of the statute. Yet if the entry were on some other paper, it seems it would not only be admissible but sufficient. For the expression "other writing" in the statute only means any other writing containing the contract (*x*).

Eighthly, as to the mode in which the statute is to be taken advantage of.

HOW THE
STATUTE IS
TO BE TAKEN
ADVANTAGE
OF.

It must now be pleaded, in all cases specially (*y*).

(*r*) *Waters v. Tompkins*, supra; *Beran v. Gething*, 3 Q. B. 740; *Baildon v. Walton*, 1 Exch. 632.

(*s*) *Cleare v. Jones*, in error, 6 Exch. 573.

(*t*) *Towler v. Chatterton*, 6 Bing. 258; 3 M. & P. 619;

31 R. R. 411; *Hilliard v. Lenard*, Moo. & M. 297.

(*u*) *Smith v. Battens*, 1 M. & Rob. 341.

(*x*) *Bradley v. James*, 22 L. J., C. P. 193; 13 C. B. 822.

(*y*) Ord. XIX. r. 15. See

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The defendant must now plead that the claim is barred by the Statute of Limitations (z).

Form of plea.

Reply to a plea of set-off.

To a plea of set-off, the Statute of Limitations must be replied specially (a).

Reply of the saving clauses.

The plaintiff may reply to a plea of the statute, that he is within the saving clause, or rather such parts as are unrepealed. An acknowledgment or payment obviating the statute must be specially pleaded (b).

WHEN INDEPENDENTLY OF THE STATUTE, LAPSE OF TIME IS A BAR.

Lastly, independently of the statute, if a note be twenty years old (c), it will be presumed to have been paid, in the absence of circumstances tending to repel the presumption (d).

The lapse of thirteen years has been held sufficient to raise a presumption of the repayment of a loan not secured by a note (e).

Wakelee v. Daris, 25 W. R. 60. In the County Court a defendant must give notice of it as a special defence, County Court Act, 1888, s. 82; County Court Rules, 1889, Ord. X. rr. 10 & 14 (a).

(z) And should apparently state the Act on which he relies, which for actions on a bill or note is the 21 Jac. 1, c. 16, s. 3. See R. S. C. 1883, Forms in Appendix.

(a) *Chapple v. Durston*, 1 C. & J. 1; 35 R. R. 669. See post, Chapter on REMEDIES; Pleading.

(b) *Skeet v. Lindsay*, [1877] 2 Ex. D. 314.

(c) Such, for two hundred years, has been the common law as to a bond. The defence was introduced into Ireland by statute 8 Geo. 1, c. 4, and into England by the 3 & 4 Will. 4, c. 42, s. 3.

(d) *Duffield v. Creed*, 5 Esp. 52; *Brown v. Rutherford*, 14 Ch. D. 687.

(e) *Cooper v. Turner*, 2 Stark. 497; 20 R. R. 730.

The giving of a Bill being a conditional payment, the date of payment takes back when the bill is met, & a purchaser of book debts does not acquire a debt for w^t the vendor has rec^d a cheque or bill. *Felix Hadley & Co. v. Hadley* [1898] 2 Ch. 680. Cf. p. 478. 3rd ed. payt was to be by "approved acceptance". Seller 1890ft took buyer's acceptance, & on 25 Sept. stopped the goods in transitu. Oct 1 buyer insolvent. Held - no payt as as to deprive seller of right of stoppage in transitu. *M. Dowell & Neilson's Trustees v. Snowball Co.* 7 F. 35 (1905).

Bankruptcy Where a jt. creditor takes a bill for the jt has right to a receiving order on a writ notice founded on the jt debt is suspended while bill remains current or if it is in hands of indorsee for value. *In re Debtor*. 77 L.J. K.B. 46 O.A.

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HOW FAR A BILL OR NOTE IS CONSIDERED AS PAYMENT.

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THOUGH it be a general rule of law, that one simple contract cannot be satisfied by another similar executory contract (a), for that is merely substituting one cause of action for another, yet the delivery of a valid bill or note suspends the creditor's remedy for a debt, and if he either receive the money on the instrument, or be guilty of *laches*, it operates as a complete satisfaction (b). "The law," says Lord Kenyon, "is clear, that if, in payment of a debt, the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt, until such bill or note becomes payable, and default is made in the payment; but, if a bill or note is of no value, as if, for example, drawn on a person who has no effects of the drawer in his hands, and who, therefore, refuses it, in such case he may consider it as waste paper, and resort to the original demand, and sue the debtor on

Suspends the remedy on a simple contract.

(a) But see Com. Dig. Accord, B.; *Good v. Cheesman*, 2 B. & Ad. 328; 4 C. & P. 513; 36 R. R. 574; *Cartwright v. Cook*, 3 B. & Ad. 701; 37 R. R. 534; *Garrard v. Woolner*, 8 Bing. 258; 1 M. &

Sc. 327; *Carter v. Wormald*, 1 Exch. 81.

(b) 3 & 4 Anne, c. 9, s. 7; *Sibree v. Tripp*, 15 L. J., Exch. 318; 15 M. & W. 23.

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it" (c). The taking a bill or note from the original debtor, or from a third person (d), amounts to an agreement to give the debtor credit for the time it has to run ; but when that time has expired, and the bill or note is in the hands of the creditor unpaid, the liability of the debtor on the original debt revives (e).

Collateral
security.

But a creditor may agree to take for a debt already due a bill as a collateral security, without affecting his present right to sue for that debt. A creditor who takes from his debtor as a collateral security only a bill indorsed by his debtor, as he is trustee of the rights, so he is bound by the duties of a holder, and if he neglects to present or give notice of dishonour to his debtor, the debtor is discharged, for no one but the actual holder can perform these duties (f).

Form of
pleading.

It is not essential to plead the taking of a negotiable instrument, either as payment or as satisfaction. In answer to an action for a debt, it is sufficient to allege that a bill or note, payable to order or bearer, was delivered for and on account of the sum due (g), and that the bill or note has been or is running, or that it is in the hands of a third person (h). But a plea was not double, which alleged both that the bill was taken for and on account, and also in payment (i). But the liberty of pleading that a bill or note was given or taken *on account* was confined to the case of such instruments. It must have appeared on the face of the plea that the bill or note was payable to order or to bearer, otherwise the plea would be bad, even after verdict (k).

The payment of a substituted note, though given by a stranger, has been held, in an action on the first note, admissible under a plea of payment (l).

(c) *Stedman v. Gooch*, 1 Esp. 3 ; *Kearslake v. Morgan*, 5 T. R. 513. An unsatisfied judgment on the bill *alone* will not destroy the original debt. *Tarleton v. Allhusen*, 2 Ad. & Ell. 32.

(d) *Bellshaw v. Bush*, 11 C. B. 191 ; *Bottomley v. Nuttall*, 28 L. J., C. P. 110 ; 5 C. B., N. S. 122.

(e) See "unpaid seller," Sale of Goods Act [1893], s. 38 (1) b.

(f) *Peacock v. Pussell*, 32 L. J., C. P. 256.

(g) *Kearslake v. Morgan*, 5 T. R. 513 ; see *Griffiths v. Owen*, 13 M. & W. 58.

(h) *Price v. Price*, 16 M. & W.

232 ; but see *Mercer v. Cheese*, 12 L. J., C. P. 56 ; 4 M. & G. 804 ; *Crisp v. Griffiths*, 2 C., M. & R. 159.

(i) *Maillard v. Duke of Argyle*, 6 M. & G. 40. And an allegation that a bill was given "on account of and in payment and discharge," is not equivalent to an allegation that it was given in satisfaction. *M'Dowall v. Boyd*, 17 L. J., Q. B. 295 ; *Kemp v. Watt*, 15 M. & W. 672.

(k) *James v. Williams*, 13 M. & W. 828.

(l) *Thorne v. Smith*, 20 L. J., C. P. 71 ; 10 C. B. 659.

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The taking a bill or note from a party bound by a contract under seal does not extinguish or suspend the remedy on the speciality, unless the bill or note be actually paid. Thus, where one of three joint covenantors gave a bill of exchange for part of a debt secured by the covenant, it was held that the bill only operated as a collateral security, not affecting the remedy on the covenant, and even though judgment had been obtained on the bill; *Le Blanc, J.*, observing, "The giving of another security, which, in itself, would operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless it produce the fruit of a judgment" (*m*).

Not on a contract under seal.

Where a tenant gave a note of hand for arrears of rent, it was held that the landlord might nevertheless distrain, for the note was no alteration of the debt till after payment (*n*).

Does not suspend distress.

The Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, s. 41, enacts, that an application to tax an attorney's or solicitor's bill must be made within twelve months after payment. Where a promissory note is given for an attorney's bill payable at a future day, the twelve months run from the time the note was paid, and not from time it was given, unless it were agreed to treat it as payment at that time (*o*).

Note in payment of an attorney's bill.

If the debtor, instead of paying the creditor, directs him to take a bill of a third person, which the creditor does, and the bill is dishonoured, the liability of the original debtor revives (*p*); and it is not necessary to give the original debtor notice of the dishonour (*q*). The bill or note must be presented within a reasonable time (*r*).

Consequence of a creditor taking bills of a third person.

So if the creditor, *not having the option of taking cash*, takes of his own accord a bill of his debtor's agent, the

(*m*) *Drake v. Mitchell*, 3 East, 251; 7 R. R. 449; followed in *Wegg Prosser v. Evans*, [1895] 1 Q. B. 108. And see *Curtis v. Rush*, 2 Ves. & B. 416.

(*n*) *Harris v. Shipway*, 1744; *Ewer v. Lady Clifton*, C. B., Trin. T. 1735; Bull. N. P. 182; *Pulfrey v. Baker*, 3 Price, 572; *Davis v. Gyde*, 2 Ad. & Ell. 623; 4 N. & M. 462. Even a bond given for rent does not extinguish it. Rent, though due on a parol lease, is of as high a nature as an obligation. 11 Vin. Ab. 289. *Palmer v.*

Bramley, [1895] 2 Q. B. 405.

(*o*) *Sayer v. Wagstaff*, 5 Beav. 415; *In re Harries*, 13 M. & W. 3; *In re Romer v. Haslam*, [1893] 2 Q. B. 286.

(*p*) *Marsh v. Pedder*, 4 Camp. 257; Holt, N. P. C. 72; *Ex parte Dickson*, cited 6 T. R. 142; *Taylor v. Briggs*, M. & M. 28; and see *Robinson v. Read*, 9 B. & C. 449; 4 Man. & Ry. 349.

(*q*) *Swinyard v. Rowes*, 5 M. & S. 62; 17 R. R. 274.

(*r*) *Chamlerlyn v. Delarive*, 2 Wilson, 354.

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debtor is not discharged (*s*). But if the debtor refer his creditor to a third person for payment generally, and the creditor, having the option of taking cash, elects to take a bill which is dishonoured, the original debtor is discharged (*t*).

Of the creditor's agent taking the debtor's bill.

The consequence of giving a bill to an agent, an auctioneer, for example, who has no authority to receive anything but cash, is, that the party giving the bill is not discharged from the demand of the principal, although the bill fall due at the period when the debt ought to have been discharged, and be regularly paid to the holder (*u*).

The taking of his separate bill from one of several partners for a joint debt, will, as we have seen, discharge the others. Such a transaction imports an agreement between the creditor and the firm, that the creditor shall rest on the liability of the one partner alone, and shall discharge the others; that is, an accord—and the separate bill is a satisfaction. For the separate liability of one partner may, in many cases, be more advantageous than his joint liability with others. It is not extinguished, at law, by his predecease; in the event of a separate adjudication of bankruptcy against him, it would be satisfied before joint debts (*x*), and it avoids difficulties which might arise in suing him with another defendant (*y*).

Where the creditor's rights against an original debtor

(*s*) *Robinson v. Read*, 9 B. & C. 449; *Marsh v. Pedder*, Holt, N. P. C. 72; 4 Camp. 257.

(*t*) *Strong v. Hart*, 6 B. & C. 160; 9 D. & R. 189; 2 C. & P. 55; 30 R. R. 272; *Smith v. Ferrand*, 7 B. & C. 19; 9 D. & R. 803; and see *Baillie v. Moore*, 15 L. J., Q. B. 169; 8 Q. B. 489.

(*u*) *Sykes v. Giles*, 5 M. & W. 645; *Williams v. Evans*, 1 Law Rep., Q. B. 352; *Cutterall v. Hindle*, 1 Law Rep., C. P. 186. A cheque duly honoured is equivalent to cash; thus, when the steward of a manor received payment from a copyholder by a crossed cheque, which was duly honoured, the payment was held good as against the lord, although the bankers, through whose hands the cheque necessarily passed being crossed, detained the proceeds on account of a debt due

to them from the steward. *Bridges v. Garrett*, L. R., 5 C. P. 580; 39 L. J. 251. This case was distinguished in *Pape v. Westcott*, [1894] 1 Q. B. 272, where the cheque was dishonoured. See too *Blumberg v. Life Assurance Co.*, [1897] 1 Cha. 171; and *Johnstone v. Rogers*, 80 L. T., N. S. 488.

(*r*) Bankruptcy Act, 1883, s. 40 (3). A discharge on a separate bankruptcy frees from joint debts. *Ex parte Hammond*, L. R., 16 Eq. 614.

(*y*) *Evans v. Drummond*, 4 Esp. 88; *Reed v. White*, 5 Esp. 122; *Thompson v. Percival*, 5 B. & Ad. 925; 3 N. & M. 667. An unsatisfied judgment on such a separate instrument is no bar to suing the others, *Wegg Prosser v. Evans*, [1895] 1 Q. B. 108; ante, p. 314.

are reserved, whether by express agreement (z), or by the nature of the transaction, or by the original debtor's name being on the new bill, the taking of the bill of one of several, or of a stranger, does not discharge the original debtor.

Where a debtor *indorses* a bill to his creditor, the creditor cannot sue for his debt without proving presentment of the bill and notice of dishonour (a). But where he *does not indorse* it, it seems sufficient for the creditor, when suing for the original debt, to show that the bill still remains in his hands, without proving presentment (b), or notice of dishonour (c); for that is presumptive evidence of dishonour, sufficient to throw it on the defendant to show that the bill has been paid.

What a creditor who has been paid by a dishonoured bill must prove.

If the party who gave the bill in payment as a good bill knew at the time that it was of no value, or fraudulently misrepresented the solvency of parties to it (d), the holder, on discovering the fraud, may immediately sue such party on his original liability; or, if the bill were given for goods, delivered at the time, he may disaffirm the contract, and sue in trover for the goods. Thus, where a vendee, under terms to pay for goods on delivery, obtained possession of them by giving a cheque which was afterwards dishonoured, Lord Tenterden said, "If the vendee had reasonable ground to expect that the cheque would be paid, the transaction was not fraudulent, and the property would pass to him: if he had not reasonable ground for so expecting, the transaction was fraudulent, and the vendors are entitled to recover their property in an action of trover" (e).

Where the transferor knew the instrument to be of no value.

A negotiable bill or note given in discharge of a debt, and then lost or destroyed, is at common law payment (f); but

A lost or destroyed bill, when payment.

(z) *Bedford v. Deakin*, 2 Stark. 178; 2 B. & Ald. 210.

(a) *Kearlake v. Morgan*, 5 T. R. 513; *Bridges v. Berry*, 3 Taunt. 130; 12 R. R. 618.

(b) *Goodwin v. Coates*, 1 M. & Rob. 221.

(c) *Bishop v. Rowe*, 3 M. & Sel. 362.

(d) Byles on Bills, 6th American ed. p. 575.

(e) *Hawse v. Croice*, 1 R. & M. 414; *Puckford v. Maxwell*, 6 T. R. 52; *Owenson v. Morae*, 7 T. R. 64; *Bishop v. Skillito*, 2 B. & Ald. 329, n.; 20 R. R. 457, n.;

Taylor v. Plumer, 3 M. & Sel. 562; 16 R. R. 361; *Brown v. Kewley*, 2 B. & P. 518; *Gladstone v. Hudwen*, 1 M. & Sel. 517; 14 R. R. 520; *Noble v. Adams*, 7 Taunt. 59; 17 R. R. 445; *Earl of Bristol v. Wilsmore*, 1 B. & C. 514; 2 D. & R. 755; 25 R. R. 488; *Kilby v. Wilson*, 1 R. & M. 178. See the American authorities to the same effect, Byles on Bills, 6th American ed. pp. 37, 450, 574.

(f) *Woodford v. Whiteley*, M. & M. 517; *Croice v. Clay*, 9 Exch. 604. N.B.—In this Chapter

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the statute 17 & 18 Vict. c. 125, s. 87, would enable the owner to recover, or Code, ss. 69, 70.

Payment by
bank notes or
bills or notes
payable to
bearer.

We have already seen (*g*), that it has been held that, where a bill or note payable to bearer is delivered without indorsement, not in payment of a pre-existing debt, but in payment or exchange for goods or other securities sold at the time, such a transaction amounts in general to a sale of such a bill or note, and to an election by the transferee to take it as money with all its risks, and, consequently, to complete payment by the transferor (*h*).

Where a bill
is renewed.

If, in payment of dishonoured bills, other bills be given for the sum due, and the first bills remain in the hands of the holder, if the latter bills be not paid, the liability of parties on the first bills revives (*i*). And even if the new bills be duly paid, the holder may recover on the old bills, if the amount of principal and interest due thereon be not covered by the amount of the new bills (*k*). The holder of an old bill for the full amount of which a new bill is given cannot sue on it till the new one is at maturity (*l*).

Taking a bill
determines a
lien.

The taking of a bill or note in payment will, in general, determine a lien. Thus, where the owner of a ship having a lien on the goods, until the delivery of good and approved bills, took a bill of exchange in payment, and though he objected to it at the time, afterwards negotiated it, it was held that such a negotiation amounted to an approval of the bill by him, and to a relinquishment of his lien on the goods (*m*). So, where, for goods sold, the vendor took the vendee's promissory note, and negotiated it with his banker, and it was subsequently dishonoured, but continued outstanding in the banker's hands, it was once held that the vendor, by taking the note and negotiating it, relinquished his lien, and that the lien did not revive on the dishonour

the word PAYMENT is not always used in its strict legal sense.

(*g*) Chapter on TRANSFER.

(*h*) *Cumidge v. Allenby*, 6 B. & C. 373; 9 D. & R. 391; 30 R. R. 358; *Ward v. Erans*, 2 Ld. Raym. 928; *Brown v. Kewley*, 2 B. & P. 518; *Guardians of Lichfield Union v. Greene*, 26 L. J., Exch. 140; 1 H. & N. 884; *Smith v. Mercer*, L. R., 3 Ex. 51. See the Chapter on TRANSFER.

(*i*) *Ex parte Barclay*, 7 Ves.

596; *Bishop v. Rowe*, 3 M. & S. 362; *Dillon v. Rimmer*, 1 Bing. 100; 7 Moo. 427.

(*k*) *Lumley v. Musgrove*, 4 Bing. N. C. 9; 5 Scott, 230.

(*l*) *Kendrick v. Lomar*, 2 C. & J. 405; 2 Tyr. 438.

(*m*) *Horncastle v. Furrer*, 3 B. & Ald. 497; 2 Stark. 590; 22 R. R. 461; *Alsager v. St. Katherine's Dock Company*, 14 M. & W. 784; *Tamaco v. Simpson*, 19 C. B., N. S. 478.

of the note, the note continuing in the banker's hands (*n*). But this doctrine has been overruled by a decision of the highest authority (*o*).

But if a bill or note is taken, and, remaining in the vendor's hands, is dishonoured, the goods not being delivered, it should seem that the lien revives (*p*).

On the sale of real property the taking and negotiating a note or bill by the vendor does not amount to a relinquishment of his lien (*q*) on the land (*r*) for the unpaid purchase-money.

But not on
real property.

A bill, cheque, or promissory note was earnest, or part payment, within the seventeenth section of the Statute of Frauds, so as to obviate the necessity of a written contract (*s*).

Is earnest.

A covenant to pay in promissory notes implies and includes a covenant to pay the notes when due (*t*).

An unstamped bill or cheque is not payment (*u*).

(*n*) *Bunney v. Poyntz*, 4 B. & Ad. 568; 1 N. & M. 229; 38 R. R. 309.

(*o*) *Gunn v. Bolckow, Vaughan, & Co.*, L. R., 10 Chan. Ap. 490, where it was held that a vendor's lien was only conditionally discharged by taking vendee's acceptances, and was capable of reviving on their dishonour, even though they had been negotiated.

(*p*) *New v. Swain*, 1 Dans. & L. 193; 34 R. R. 767; *Valpy v. Oakley*, 16 Q. B. 941. Sale of Goods Act, s. 38 (1) b.

(*q*) *Ex parte Loring*, 1 Rose, 19; *Grant v. Mills*, 2 V. & B. 306; 13 R. R. 101. See *Macreth v. Simmons*, 15 Ves. 329; 10 R. R. 85. See as to the effect of taking a void cheque, *Bond v. Warden*, 14 L. J., Chan. 154; 1 Coll. 583.

(*r*) As to the circumstances under which the transfer of a bill is payment in bankruptcy, see the Chapter on BANKRUPTCY.

(*s*) Now Sale of Goods Act [1893], s. 4. If duly stamped, see Stamp Act [1891], s. 14 (4), and the analogous case of *Jones v. Ryder*, 4 M. & W. 32, under the Statute of Limitations.

(*t*) *Dixon v. Holroyd*, 27 L. J., Q. B. 43; 7 E. & B. 903.

(*u*) *Cundy v. Marriott*, 1 B. & Ad. 696; 35 R. R. 416; *Bond v. Warden*, 14 L. J., Ch. 154; 1 Col. 583. But now, in case of a bill payable on demand, the stamp may be subsequently affixed by the drawee, Stamp Act, [1891] s. 38 (2); and the bill or cheque is good, though the penalties are incurred.

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OF THE CON-
FLICT OF THE
LAWS OF DIF-
FERENT
COUNTRIES
RELATING TO
BILLS.

SOMETIMES bills drawn in England are payable in a foreign country, and bills drawn in a foreign country are payable in England. Sometimes English bills circulate abroad, and foreign bills circulate here: and, frequently, suits on foreign bills, or bills negotiated abroad, are brought in English Courts of Justice. The laws of foreign countries, as to bills of exchange, often differ widely from the law of England, and from each other. But natural justice, mutual convenience, and the practice of all civilized nations, require that contracts, wherever enforced, should be regulated and interpreted according to the laws with reference to which they were made, otherwise the rights and liabilities of parties would entirely depend on the law of the country

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where the remedy might happen to be sought. Such a state of things would introduce uncertainty and confusion infinitely greater than arises from that measure of respect and comity, which every tribunal now shows to the law of foreign nations.

In determining how far foreign laws are to regulate foreign contracts in English Courts, a great variety of circumstances are often necessary to be considered. It may be essential to regard the domicil of one, or both, or all, of the contracting parties, the place where the contract is made (which place it may not always be easy to determine, for the parties may live in different countries), the place where the contract is to be performed, the place where the subject-matter of the contract is locally situate, and the place where the remedy is sought.

Elements in
the question.

Many nice questions, therefore, have already arisen, and many more will, no doubt, in future arise in our Courts, from the conflict of English with foreign law, as to bills of exchange.

The decisions of English Courts of justice on the international law of contracts have not been very numerous, but nothing can exceed the discrepancy and irreconcilable contrariety of the doctrines and opinions of foreign writers, not only on the application of the principles of international law to foreign contracts, but on the very principles themselves (*a*). To enter into the discussion of such topics would be foreign to the object and exceed the limits of this little book.

Discrepancy
in the
doctrine of
foreign
writers.

But in the dearth of authoritative decisions, on the degree to which foreign law is admissible here to govern the contracts arising on bills or notes made, negotiated, or payable abroad, it may not be altogether useless, with a view, as well to the right understanding of such decisions as have already been pronounced, as to the solution of such undecided questions on the same subjects as may hereafter arise, first to enumerate some of the general principles which seem to have guided the English Courts in determining the circumstances, and the degree in which they will respect foreign laws, in interpreting contracts either altogether or partially foreign, and then to adduce instances illustrating the application of those principles to the Laws of Bills of Exchange.

General
principles
laid down in
England.

(*a*) See Story's Conflict of Laws.

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Among established principles in the law of this country, the five (b) following rules appear to rank.

LEX LOCI
CONTRACTUS.

First, every contract is, in general, to be regulated by the laws of the country in which it is made. For the laws of that country alone are there binding *proprio vigore* on aliens as well as on natural-born citizens or subjects (c), and the parties to the contract may generally be taken to have contemplated the legal consequences which those laws deduce from their stipulations.

Hence the formalities essential to the validity of the contract, and the interpretation of that contract, are to be governed by the laws of the country where it is made.

LEX LOCI
SOLUTIONIS.

But, secondly, where a contract is made in one country to be performed in another, the country where the contract is to be performed is deemed the country in which it was made. Such seems to be the general rule of the civil law. "*Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit.*" Some learned civilians have, indeed, entertained a different opinion, but such is unquestionably the general rule in the common law of England. "The law of the place," says Lord Mansfield, "can never be the rule, where the transaction is entered into with the express view to the law of another country, as the rule by which it is to be governed" (d).

Contracts
against
morals, the
law of
nations, or
British
interest.

Thirdly, contracts immoral, or contrary to the law of nations, or injurious to British public interests, though valid where made, will not be enforced on behalf of a guilty party in our Courts.

(b) That is to say, as to executory contracts and contracts relating to moveables. But the transfer of real or immoveable property is governed by another rule, the *lex rei sitæ*. See *Fenton v. Lexington*, Dom. Proc. 1859.

(c) According to some foreign writers, the domicile of persons entering into contracts, while in a foreign country, is to be considered in those contracts. Difficulties then arise, where the domicile of two or more of the contracting parties is not the same. The common law does not, it should seem, regard these niceties. *Copin*

v. Adamson, L. R., 9 Ex. 345 and 396, upheld on appeal; *Jefferys v. Boosey*, 4 H. of L. Cases, 814; 24 L. J., Exch. 81. See as to a judgment *in rem*, *Castrique v. Imrie*, L. R., 4 H. of L. 414; 8 C. B., N. S. 1; and *Alcock v. Smith*, [1892] 1 Cha. 238.

But *quære*, how far the domicile of parties to bills of exchange regulates their personal capacity or incapacity to contract.

(d) *Robinson v. Bland*, 2 Burr. 1077; 1 W. Bl. 256; and see *Rothschild v. Currie*, 1 Q. B. 43; see Story's Conflict of Laws, 280 to 281; *Allen v. Kemble*, 6 Moore, P. C. C. 314; *Moulis v. Owen*, [1907] 1 K.B. 746.

But, fourthly, one country will not regard the revenue laws of another country.

Fifthly, the remedy is to be governed by the law of the country where that remedy is sought.

The following are instances of the supremacy of the *lex loci contractus* according to the first general rule.

The validity of a bill or note as regards requisites in form is determined by the law of the place of issue ; and the validity in form of the acceptance, acceptance *supra* protest, and indorsement, by the law of the place of such contract (e).

Subject to the other provisions of the Code (f), the effect of drawing, indorsing, and accepting is determined by the law of the place where the contract is made.

The duties of the holder with regard to presentment for acceptance, or for payment, protest and notice of dishonour, are also regulated by the law of the place where the act is done, or the bill is dishonoured.

An acceptance void, or avoided by the law of the country where it is given, is not binding here. By the law of Leghorn, if a bill be accepted, and the drawer then fail, and the acceptor had not sufficient effects of the drawer in his hands at the time of acceptance, the acceptance becomes void. An acceptor at Leghorn, under these circumstances, instituted a suit at Leghorn, and his acceptance was thereupon vacated. Afterwards, he was sued in England as acceptor, and then filed his bill for an injunction and relief. Lord Chancellor King granted a perpetual injunction, enjoining the plaintiff at law from suing on the bill (g).

(e) Code, s. 72. The place of issue is where the first delivery took place, not necessarily where the signature was affixed. *Chapman v. Cottrell*, 34 L. J., Ex. 186.

(f) There are three exceptions to the general rule given in the Code, s. 72: first, the revenue laws of other countries as to the necessity for a stamp are disregarded; second, a bill issued out of the United Kingdom, conforming with our law as to requisites in form, may, for enforcing payment, be treated as valid between all parties dealing

with it here; third, where an inland bill is indorsed abroad, the indorsement shall, as regards the payer, be interpreted by our law; but in *Alcock v. Smith*, [1892] 1 Cha. 238, a transfer of an overdue bill by a proceeding *in rem* in a foreign country was held to be governed by the law of that country. The other provisions referred to seem to be those in sect. 53.

(g) *Burrows v. Jemino*, 2 Stra. 733; Sel. C. 144; 2 Eq. Ab. 526; see *Wynne v. Callander*, 1 Russ. 295.

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Infringing revenue laws.

LEX FORI.

CASES WHERE THE LEX LOCI CONTRACTUS GOVERNS.

Requisites in form.

Interpretation of contracts.

Duties of the holder.

So, an English bank which receives & collects a cheque for an Austrian Bank which is a holder for value of a cheque with a forged indorsement, is not liable for conversion, the Austrian Bank having taken the cheque in Austria without gross negligence, & so obtained a title by Austrian law *Embricos v. Anglo Austrian Bank* [1905] 1 K.B. 677.

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XXIV.Foreign in-
dorsement of
foreign note.

A bill of exchange was drawn in France, and indorsed in blank in France, without following the formalities prescribed by the French law. It was held that the indorsement being invalid by the French law was so here, for that the contract and indorsement being made in France must be governed by the law of France (*h*). But where a bill of exchange was drawn in France in the French language on and accepted by a drawee in England, the indorsement though informal by the French law being good according to our law, the acceptor was held liable, as title could be made against him here through such an indorsement (*i*).

Foreign dis-
charge.

Where the defendant gave the plaintiff, in a foreign country where both were resident, a bill of exchange drawn by the defendant on a person in England, which bill was afterwards protested here for non-acceptance, and the defendant afterwards, while still resident abroad, became bankrupt there, and obtained a certificate of discharge by the law of that state, it was held that such certificate was a bar to an action here, founded upon an implied assumpsit to pay the amount of the bill, because the implied contract was made abroad (*k*). So payment of part in discharge of the whole of a debt, though ineffectual by the law of England, will nevertheless bar the whole debt even here, if the payment were made in a foreign country, by the law of which it would have that effect (*l*).

But a discharge by the law of a place where the contract was neither made nor to be performed, is not a discharge in any other country (*m*). Therefore, to an action against the acceptor of an English bill, the discharge of the acceptor under a colonial bankruptcy in Australia is no defence (*n*). It is otherwise in the case of a Scotch bankruptcy, for that operates under a direct enactment of the Imperial legislature (*o*).

An I O U given for money lent in Germany to play there at games of chance, not illegal in Germany, is valid here (*p*). *But not a cheque. Moulis v. Owen* [1907] 1 K.B. 746.

(*h*) *Trimby v. Vignier*, 1 Bing. N. C. 151; 4 M. & S. 695; 6 C. & P. 25; but see *Wynne v. Jackson*, 2 Russ. 351. It is good as a procuration, however, *Bradlaugh v. De Rin*, L. R., 5 C. P. 473.

(*i*) *Ex parte Smallpage*, 30 Ch. D. 598; 55 L. J. 116. And see Code, s. 72 (1) b.

(*k*) *Potter v. Brown*, 5 East, 124; 1 Smith, 351; 7 R. R. 663.

(*l*) *Ralli v. Dennistoun*, 6 Exch. 483.

(*m*) Story's Conflict of Laws, s. 342.

(*n*) *Bartley v. Hodges*, 30 L. J., Q. B. 352.

(*o*) *Smith v. Buchanan*, 1 East, 6; 5 R. R. 499; *Phillips v. Allan*, 8 B. & C. 477; 32 R. R. 450.

(*p*) *Quarrier v. Colston*, 12 L. J., Chan. 57; 1 Ph. 147.

The following are cases in which the *lex loci solutionis* has been held to govern.

A promissory note, or bill of exchange payable to bearer, made and payable in England, is transferable by delivery abroad, although by the law of the country where the delivery takes place, mere delivery is inoperative (*q*).

The time of payment is to be calculated according to the law of the country where the bill is made payable (*r*). For example, the days of grace. Where the time of payment was postponed by law, it was held that the contract of the indorser was correspondingly enlarged (*s*).

The notice of dishonour given and received in a foreign country must be regulated by the law of that country.

It has also been held, that not only the protest but the notice of dishonour transmitted from a foreign country must be regulated by the law of the country where the bill is payable. A bill was drawn in England in favour of the defendant, a payee in England, on a house in Paris, and accepted in Paris, *payable there*, and indorsed to the plaintiff in England. The bill being dishonoured by non-payment, notice was given to the plaintiff in England, which notice was good according to the French law, but too late according to the English law. The notice was transmitted the same day by the plaintiff to the defendant. An action was brought in England by the plaintiff, the English indorsee, against the defendant, an English indorser. It was insisted by the defendant that the requisites of the notice, which was received in England, should, as between the indorsee and indorser both domiciled in England, be regulated by the English law. But the Court of Queen's Bench held, that the bill being payable in France was to be considered, even as between the indorsee and indorser, as a French contract, and that the French law, as to the notice of

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CASES IN
WHICH THE
LEX LOCI
SOLUTIONIS
GOVERNS.

Foreign indorsement of English note or bill.

Time of payment.

Protest and notice of dishonour.

(*q*) *De la Chaumette v. Bank of England*, 2 B. & Ad. 385; 9 B. & C. 208; 36 R. R. 599; *Lebel v. Tucker*, L. R., 3 Q. B. 77; *Gorgier v. Mirille*, 3 B. & C. 45; 27 R. R. 290, cited in *Miller v. Ruce*, Smith's Leading Cases, Vol. 1, 447; *Bradlaugh v. De Rin*, L. R., 3 C. P. 538; decided on appeal in the Exchequer Chamber, L. R., 5 C. P. 473; 39 L. J. 254, the Court holding the B.B.E.

indorsement good, either as an indorsement, or as a procuration (to which an indorsement in blank by the French law is equivalent). See Arts. 157 and 158; and Code, s. 72 (2), proviso.

(*r*) *Beawes*, 151; *Marius*, 75, 89 to 92, 101 to 103; *Bayley*, 6th ed. 249. See ante, p. 282; and Code 72 (5).

(*s*) *Rouquette v. Overman*, L. R., 10 Q. B. 525.

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dishonour transmitted from France to England, must therefore so far prevail (*t*). Where a bill of exchange drawn in England, payable in Spain—a country where no notice of dishonour for want of acceptance is required—was dishonoured there for want of acceptance, and, after the lapse of several days, intimation of that fact was given to the indorsee in England, who immediately gave notice to his indorser, it was held by the Court of Appeal that the indorser was liable (*u*).

Acceptance at
a particular
place.

Where a bill is made payable at a particular place either by the acceptor himself or by the drawer, the law of acceptance prevailing at that place governs the contract of acceptance (*x*).

General
acceptance.

But a general acceptance, being a contract to pay everywhere, is governed by the law of the place where it is given, for it is payable there as well as in every other place (*y*).

Rate of
interest.

A bill was drawn in California, where the rate of interest is twenty-five per cent., on a drawee at Washington, where the rate of interest is only six per cent.; in an English action against the drawer the Californian rate of interest is recoverable; but in an action against the acceptor, the Washington rate of interest would alone be recoverable (*z*).

IMMORAL,
ILLEGAL AND
INJURIOUS
CONTRACTS.

The third rule is, that contracts immoral, or contrary to the law of nations, or injurious to British public interests, will not be enforced on behalf of a guilty party in our Courts.

The reason is, that the laws of foreign countries are admitted in our Courts, not *proprio vigore*, but *ex comitate*. The judicial power of every country must reserve to itself

(*t*) *Rothschild v. Currie*, 1 Q. B. 43, doubted in *Gibbs v. Fremont*, 22 L. J., Exch. 5; 9 Exch. 31; and by Story, p. 197; but recognized and followed by the Court of Common Pleas in *Hirschfield v. Smith*, 35 L. J., C. P. 177; L. R., 1 C. P. 340. See also *Allen v. Kemble*, 6 Moore, P. C. C. 314, where it was held that the drawer is liable, according to the law of the country where the bill is drawn.

(*u*) *Horne v. Rouquette*, L. R.,

3 Q. B. D. 514.

(*x*) See the American authorities, Byles on Bills, 6th American ed. 593.

(*y*) *Don v. Lipman*, 5 Cl. & Fin. 1, 12, 13; *Sprole v. Legge*, 1 B. & C. 16; 2 D. & R. 15; 3 Stark. 156; *Kearney v. King*, 2 B. & Ald. 301.

(*z*) *Gibbs v. Fremont*, 9 Exch. 31. See *Cooper v. Earl of Waldegrave*, 2 Beav. 282; *Cougan v. Banks*, Chitty on Bills, 683; *Allen v. Kemble*, 6 Moore, P. C. C. 314.

a discretion as to the laws it will enforce (*a*), otherwise it might in some cases be governed by barbarous and pernicious rules.

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The following are instances of the application of the fourth rule, that the English Courts will not regard the revenue laws of other countries (*b*).

REVENUE
LAWS OF
OTHER
COUNTRIES
DISRE-
GARDED.

Bills or notes drawn or made in a foreign independent state, or at sea, do not require, in order to be valid in this country (*c*), a stamp of the country where they are made or drawn (*d*). "Since the time of Lord Hardwick," observes Abbott, C.J. (*e*), "it has been settled, that the Courts of this country will not take notice of the revenue laws of a foreign state. It would be productive of prodigious inconvenience if, in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid." But bills drawn in England and payable abroad are subject to an English stamp, and the rule does not exempt a bill or note made abroad from the necessity of complying with the Stamp Act when used in here. (*f*) see Chap. IX.

Stamps on
foreign bills.

If the bill or note were made in any part of the British empire, formerly it might require the stamp appropriated by the law of the place (*f*).

On Colonial
bills.

By the Stamp Act of 1854, 17 & 18 Vict. c. 83, s. 4 (repealed 1870), every bill purporting to be drawn out of the United Kingdom was, for all the purposes of that Act, to be deemed to be a foreign bill.

And now the Stamp Act, 1891, s. 36, contains a similar provision.

The following are instances of the application to bills of exchange of the last rule, viz. :—that though the *lex loci*

APPLICATION
OF THE LEX
FORI TO
FOREIGN
BILLS.

(*a*) See the American authorities, Byles on Bills, 6th American ed. p. 587.

(*b*) See *Pellecat v. Angell*, 2 C. M. & R. 311.

(*c*) But as to the English stamp on foreign bills, see the Chapter on THE STAMP.

(*d*) *Rotch v. Edie*, 6 T. R. 425 ; 3 R. R. 222 ; *Boucher v. Lawson*, Rep. temp. Hardwicke, 198 ; *Holman v. Johnson*, Cowp. 343 ; *Clugas v. Penaluna*, 4 T. R. 467 ; 2 R. R. 442 ; Code, s. 72 (1) a.

(*e*) *James v. Cutherwood*, 3 D.

& R. 190 ; *Wynne v. Jackson*, 2 Russ. 351 ; but see the note to Story's Conflict of Laws, 2nd ed. p. 341 ; *Bristow v. Secquerille*, 19 L. J., Ex. 289 ; 5 Exch. 275.

(*f*) *Alves v. Hodgson*, 7 T. R. 241 ; 4 R. R. 433 ; *Clegg v. Lery*, 3 Camp. 166. A local stamp law must be proved by the person who relies on it. *Buchanan v. Rucker*, 1 Camp. 63 ; 9 R. R. 531 ; *Le Cheminant v. Pearson*, 4 Taunt. 367 ; 13 R. R. 636 ; *Millar v. Heinrich*, 4 Camp. 155. Now Code, s. 72 (1) a, seems general.

(*h*) *Bank of Montreal v. Exhibit & Trading Co.* 22 T. R. 25—2
722.

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contractus must regulate and interpret the contract, yet that the *lex fori* must govern the remedy.

Statutes of
Limitation.

Statutes of Limitation in general affect the remedy only, and not the substance of the contract (*g*).

Therefore, where by the law of the country where the contract was made the plaintiff would have had forty years to bring his action, yet, as he sued in England, it was held, that he must bring his action within six years (*h*). So, on the other hand, though the payee of a French promissory note must, if he had sued in France, have brought his action there within five years, it was held that he might here bring his action at any time within six years (*i*). And where by the law of Italy a man must bring an action within fourteen days, yet if the action be brought here, our law as to limitation in time prevails (*k*).

Set-off.

So, the power to set off a cross debt depends on the law of the country where the remedy is sought (*l*).

Power of
arrest.

So, though a defendant might not be subject to arrest in the country where the contract was made, yet he was subject to arrest where the law of this country gave the creditor the right to arrest, if the remedy were sought here (*m*).

So, where by the law of the foreign country, a criminal prosecution must be a preliminary to a civil action, the absence of such a previous prosecution is no defence to an action here (*n*).

Statute of
Frauds.

So, again, the fourth section of the Statute of Frauds enacts, that *no action shall be brought* on certain agreements

(*g*) *Quære*, whether that be so where the statute not merely limits the remedy but actually extinguishes the debt. See *Huber v. Steiner*, 2 Bing. N. C. 202, 211; 2 Scott, 304; 1 Hodges, 206; *Don v. Lipman*, 5 Cl. & Fin. 1, 16, 17; Story, 2nd ed. 840. In such a case it should seem that the statute is equivalent to a release.

The rule as to the application of the Statute of Limitations in America has been held to depend on the law of the State where a note is made, and the length of the residence there (Byles on Bills, 6th American ed. p. 595); but the English rule is doubtless the true one. See *Alvarez de la*

Rosa v. Prieto, 33 L. J., C. P. 262.

(*h*) *British Linen Company v. Drummond*, 10 B. & C. 903; 34 R. R. 595.

(*i*) *Huber v. Steiner*, 2 Bing. N. C. 202; 2 Scott, 304; 1 Hodges, 206; *Harris v. Quine*, L. R., 4 Q. B. 653. See *Don v. Lipman*, 5 Cl. & Fin. 1, 15, 16.

(*k*) *Casanova v. Meier*, 1 T. L. R. 245; *Harris v. Quine*, L. R., 4 Q. B. 653.

(*l*) Byles on Bills, 6th American ed. p. 596.

(*m*) *De la Vega v. Vianna*, 1 B. & Ad. 284; 35 R. R. 298; and see *Shaw v. Harrey*, M. & M. 526; 31 R. R. 755.

(*n*) *Scott v. Lord Seymour*, 31 L. J., Exch. 457.

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unless they are in writing. It has been held that this enactment does not affect the solemnities of the contract, but only the rules of procedure: and, therefore, though a parol contract, within the fourth section of the Statute of Frauds, be made in France, and be valid there, yet that an action on it will not lie in England (*o*).

The protest and notice of dishonour are parcel of the contract, and not incidents of the remedy for the breach of it. They must, therefore, be regulated by the law of the country where the bill is payable (*p*), or where the contract is made, or where the notice is given, and not solely by the law of the country where the remedy is sought.

Protest and
notice of
dishonour.

When foreign law is relied on in pleading, it is proper, first, to state what the foreign law is, and then to allege the facts, bringing the case within that foreign law (*q*).

Pleading
foreign law.

It will in general be assumed, that the law of a foreign country is the same as the law of this country in respect of negotiable instruments till the contrary be proved, the burden of proof lying on the party alleging such difference (*r*). Therefore, if a promissory note made in Scotland (*s*) be sued upon in this country, and there were any difference in the law of the two countries favourable to the defendant, it lay upon the defendant to prove that difference (*t*).

Burthen of
proof.

When a bill drawn out of is payable in the United Kingdom, and the sum is expressed in foreign money, the amount, unless otherwise stipulated, shall be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable (*u*).

Foreign
currency.

(*o*) *Leroux v. Brown*, 12 C. B. 801.

(*p*) *Rothschild v. Currie*, 1 Q. B. 43. See *Rothschild v. Barnes*, Q. B. 1842; Code, s. 72 (3).

(*q*) *Benham v. Lord Mornington*, 3 C. B. 133; *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589.

(*r*) *Nouvelle Banque de L'Union v. Ayton*, 7 T. L. R. 377.

(*s*) As to the law of Scotland, see 19 & 20 Vict. c. 60. Now the Code extends to all the United Kingdom.

(*t*) *Brown v. Gracey*, D. & R. N. P. C. 41, n., per Abbott, C.J.; 25 R. R. 781, n.; but see *De La Chaumette v. Bank of England*, 2 B. & Ad. 385; and *Gibbs v. Fremont*, 9 Ex. 31, supra. As to the mode of ascertaining, proving and applying the law of foreign countries, see 24 Vict. c. 11.

(*u*) Code, s. 72 (4). For *ad valorem* duty, see Stamp Act, sect. 6, ante, p. 118, to be calculated as of day of date of instrument, not of maturity.

CHAPTER XXV.

OF A LOST BILL OR NOTE.

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Title of the finder.

THOUGH the finder of a lost bill or note acquires no property in it, so as, on the one hand, to enable him to defend an action of trover brought by the rightful owner, or, on the other, to sue the acceptor or maker, yet we have already seen that if the finder transfer a lost bill or note, which may pass *by delivery only*, his transferee, provided he took it honestly, is entitled both to retain the instrument against the loser, and to compel payment from the parties liable thereon. In the case of a cheque marked “not negotiable,” as before stated (*a*), a transferee only takes his transferor’s title, and hence this danger is averted.

Proper course for the loser to take.

Let us now inquire what steps the loser should take. And, in the first place, it is settled that if bills or notes be lost or stolen out of letters put into the post office, no action lies against the Postmaster-General. “The case of the Postmaster,” says Lord Mansfield, “is in no circumstance whatever similar to that of a common carrier; but he is like all other public officers, such as the Lords Commissioners of the Treasury, the Commissioners of the Customs and Excise, the Auditors of the Exchequer, &c.; who were

(*a*) Ante, p. 30. In a recent case, 15 T. L. R. 433, a man who had constant dealings with a bank, though he kept no balance, was held to be a “customer,” so as to entitle the bank to the protection of Code, s. 82.

never thought liable for any negligence or misconduct of the inferior officers in their several departments" (b). But a deputy postmaster is liable for neglect in not duly delivering letters (c).

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It is advisable that the loser should immediately give notice of the loss to the parties liable on the bill ; for they will thereby be prevented from taking it up without due inquiry. Public advertisement of the loss should also be given ; for if any person whosoever discounts it with notice of the loss, that will be such strong evidence of fraud that he can acquire no property in it (d). But public notice is of itself neither on the one hand sufficient nor on the other indispensable. To operate at all it must be brought home to the party to be affected by it (e).

Notice of
loss.

We have already seen that, if the bill be transferable

(b) *Whitfield v. Lord Le Despencer*, Cowp. 754 ; *Lane v. Cotton*, 1 Salk. 17.

(c) *Rowning v. Goodchild*, 3 Wils. 443 ; 2 W. Bl. 906 ; 5 Burr. 2716 ; *Hordern v. Dalton*, 1 C. & P. 181.

(d) A public notification of the loss is not only advisable to prevent the transfer of lost or stolen bills or notes into the hands of *bonâ fide* holders, but there are cases in which it was formerly considered essential to the plaintiff's right to recover of those who might have taken the instrument. See the observations of Best, C.J., in *Snow v. Peacock*, 3 Bing. 411 ; 11 Moo. 286. The law formerly was, that if a man took a lost bill or note negligently, he acquired no title against the rightful owner ; but if the loser had neglected to publish his loss, and the receiver took the note, not dishonestly, but negligently, then the negligence of the loser equalled the negligence of the receiver, and *potior erat conditio possidentis*. *Snow v. Peacock*, 3 Bing. 411 ; 11 Moo. 284 ; *Strange v. Wigney*, 6 Bing. 677 ; 4 M. & P. 470. Thus, where the plaintiff was robbed of his pocket-book, containing an indorsed bill, and then advertised the pocket-book, saying nothing of the bill, but on the contrary, stating in the

advertisement that the contents of the pocket-book were of no use to any but the owner : the Court of C. P. held that he was not entitled to recover against a negligent receiver ; for that his notice, that the contents of the pocket-book were of no use to any but the owner, tended rather to mislead than to assist parties to whom the bill might be offered. *Beckwith v. Corral*, 3 Bing. 444. If due notice had been given of the loss, then though the receiver took the instrument *bonâ fide* and without suspicion, yet if he failed to exercise proper care and caution, as if he discounted or changed a bill or note of considerable amount for a stranger without inquiry, he must have refunded. *Gill v. Cubitt*, 3 B. & C. 466 ; 5 Dowl. & R. 324 ; *Strange v. Wigney*, 6 Bing. 677 ; 4 Moo. & P. 470. In *Easley v. Crockford* the defendant was held not to have exercised due caution in taking the note, and accordingly was held liable in trover ; 10 Bing. 243 ; 3 Moo. & Scott, 700 ; *Snow v. Sadler*, 3 Bing. 610.

But now honest acquisition confers title. See ante, p. 193 ; *Bartram v. Cuddy*, 9 A. & E. 280 ; and notes to *Miller v. Race*, 1 Smith's L. C. 447.

(e) See Byles on Bills, 6th American ed. p. 557.

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only by indorsement, a forgery can convey no title, and a payment by the acceptor or other party to a man, claiming under the forged indorsement, will not exonerate him.

Presentment
and notice of
dishonour of
a lost bill.

The party who has lost or destroyed a bill must, nevertheless, make application to the drawee for payment at the time it is due (*f*), and give notice of dishonour; for the bill might still have been paid, with or without an indemnity, and the prior parties, by not having been advised of the dishonour, may have been prevented from pressing their respective remedies against parties liable to them (*g*).

Bill in the
hands of an
adverse
party.

There are three cases in which a plaintiff cannot produce a bill: it may be in the defendant's hands; it may be destroyed; or it may be lost.

If it be in the defendant's hands, the plaintiff may give him notice to produce it; and if the defendant will not do so, the plaintiff may give secondary evidence of its contents (*h*).

Whether an
action lies on
a destroyed
bill.

If it can be proved that the instrument, whether negotiable or not, has been destroyed, it was once held that secondary evidence of its contents was admissible, and that the rightful owner was entitled to recover. "If a bill be proved to be destroyed," says Lord Ellenborough, "I should feel no difficulty in receiving evidence of its contents, and directing the jury to find for the plaintiff. Even on a trial for forgery, the destruction of the instrument, charged by the indictment to be forged, is no bar to the proceedings. I remember a case before Buller, J., where the prisoner had destroyed a bank note he was accused of having forged by swallowing it; and the learned Judge who presided held that he might have been convicted without the production of the bank note; and this doctrine was approved of by the whole profession" (*i*). But this doctrine was overruled as to negotiable instruments, and it is now settled that the owner of a *destroyed* bill or note, if negotiable, cannot, *at common law* (*k*), recover against the other parties (*l*), whether the

(*f*) It has been held in America that the loss of a bill is an excuse for a reasonable delay in demanding payment. Byles on Bills, 6th American ed. p. 559.

(*g*) *Thackray v. Blackett*, 3 Camp. 164; 13 R. R. 783.

(*h*) *Smith v. McClure*, 5 East, 477; 2 Smith, 43; 7 R. R. 750.

(*i*) *Pierson v. Hutchinson*, 2 Camp. 211; 6 Esp. 126.

(*k*) *I.e.*, before the 17 & 18 Vict. c. 125, s. 87, which though not repealed is reproduced in Code, ss. 69 and 70. In *Wright v. Maidstone*, 24 L. J., Cha. 623, the Vice-Chancellor held that Courts of law had full jurisdiction under sect. 87 in case of a destroyed bill.

(*l*) *Hansard v. Robinson*, 7 B. & C. 90; 9 D. & R. 860; 31 R. R. 156. But see *Woodford v.*

bill be actually indorsed or not (*m*). Nor can he even sue on the consideration (*n*).

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And it is also now clear that, if a bill, note, or cheque, negotiable either by indorsement or by delivery only (*o*), be *lost*, no action *at common law* will lie at the suit of the loser against any one of the parties to the instrument, either on the bill or note itself, or on the consideration (*p*). "Upon the question," says Lord Tenterden, "whether an action can be brought on a lost bill, the opinions of the Judges, as they are to be found in the cases, have not been uniform, and cannot be reconciled to each other. Amid conflicting opinions, the proper course is to revert to the principle of these actions on bills of exchange. The custom of merchants is that the holder of a bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and, upon the receipt of the money, deliver up the bill. The acceptor, paying the bill, has a right to the possession of the instrument for his own security, and for his voucher and discharge *pro tanto* in his account with the drawer. As far as regards his voucher and discharge towards the drawer, *it will be the same thing whether the instrument has been destroyed or mislaid*. With respect to his own security against a demand by another holder, there may be a difference. But how is he to be assured of the fact, either of the loss or destruction of the bill? Is he to rely upon the assertion of the holder, or to defend an action at the peril of costs? And, if the bill should afterwards appear and a suit be brought against him by another holder, a fact not absolutely improbable in the case of a lost bill, is he to seek for the witnesses to prove the loss, and to prove that the new plaintiff must have obtained it after it became due? We think the custom of merchants does not authorize us to say that this is the law." And the law is the same though the bill had never been indorsed (*q*), and whether the bill be due or not (*r*). Where a bill made or become payable to bearer is lost, the acceptor, or other party, is not liable, though the bill was lost after a promise to pay by the acceptor. "If," says

Will not lie
on lost bill
or note.

Whiteley, Moo. & M. 517, and
Wain v. Bailey, 10 Ad. & E. 616;
2 Per. & Dav. 507; see *Price v.*
Price, 16 M. & W. 243; *Ramuz*
v. Crowe, 1 Exch. 167.

(*m*) *Ramuz v. Crowe*, *supra*.

(*n*) *Crowe v. Clay*, in error, 9
Exch. 604.

(*o*) *Beran v. Hill*, 2 Camp.
381; 11 R. R. 741.

(*p*) *Crowe v. Clay*, 9 Exch.
604.

(*q*) *Ramuz v. Crowe*, 1 Exch.
167.

(*r*) *Clay v. Crowe*, 9 Exch.
608.

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Lord Tenterden, "upon an offer of payment the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer, and retain his money?" (*s*).

Unless not
originally
negotiable.

But if a bill or note, *not negotiable* (that is to say, an instrument payable to the payee only, and with words restraining transfer), be lost, it is conceived (*t*) that an action will lie either on the bill or on the consideration (*u*).

Pleading.

The defence that the bill was lost before action brought must, in the superior Courts, be raised by plea, otherwise the plaintiffs may recover, by producing the ordinary secondary evidence (*x*). And a judge had formerly no power to order a stay of proceedings until an indemnity be given (*y*).

Loss after
action
brought.

If a bill be lost after action brought, and the defendant suffer a judgment by default, the Court will, on a copy verified by affidavit, refer it to the Master to see what is due (*z*). But if, in such a case, the defendant resists the action, and puts the plaintiff to prove the bill, under the ordinary issues the loss is no excuse for the non-production of it (*a*).

Loss of half-
note.

It has been said, that where a man takes half a note, he takes it necessarily under suspicious circumstances (*b*), and cannot recover to the injury of the maker. Thus, where the holder sued on the half of a 5*l.* note, the other half having been stolen from the Leeds mail, Lord Ellenborough

(*s*) *Hansard v. Robinson*, 7 B. & C. 95; 31 R. R. 166; *Davis v. Dodd*, 4 Taunt. 602.

(*t*) In America the general rule seems to be that an action will lie on a destroyed bill though negotiable, and on a lost bill though negotiable if not indorsed. See the American authorities, Byles on Bills, 6th American ed. p. 560.

(*u*) *Wain v. Bailey*, 10 Ad. & E. 616; *Price v. Price*, 16 M. & W. 243; *Ramuz v. Crowe*, 1 Exch. 167; *Hansard v. Robinson*, 7 B. & C. 90; 9 D. & R. 860; 31 R. R. 166; but see *Woodford v. Whiteley*, Moo. & M. 517; *Beran v. Hill*, 2 Camp. 381; 11 R. R. 741; see, however, *Ramuz v. Crowe*,

1 Exch. 172; *Long v. Bailie*, 2 Camp. 214, n.; *Champion v. Terry*, 3 B. & B. 295; 7 Moo. 130; *Rolt v. Watson*, 4 Bing. 273; 12 Moore, 510; 29 R. R. 563.

(*x*) *Blackie v. Pidding*, 6 C. B. 196; *Charnley v. Grundy*, 14 C. B. 608.

(*y*) *Aranguren v. Schofield*, 1 H. & N. 464; *i.e.*, till C. L. P. Act, 1854.

(*z*) *Brown v. Messiter*, 3 M. & Sel. 281; *Allen v. Miller*, 1 Dowl. 420; *Clarke v. Quince*, 3 Dowl. 26; *Flight v. Browne*, 2 Tyr. 312.

(*a*) *Poole v. Smith*, Holt, N. P. 144. See the American authorities, Byles on Bills, 6th American ed. p. 563.

(*b*) Bayley, 6th ed. 379.

said, "Payment can be enforced at law only by the production of an entire note, or by proof that the instrument, or the part of it which is wanting, has been actually destroyed. The half of this note taken from the Leeds mail may have immediately got into the hands of a *bonâ fide* holder for value; and he would have had as good a right of suit upon that as the plaintiff has upon this. But the maker of a promissory note cannot be liable, in respect of it, to two parties at the same time" (c). It is doubtful how far the argument from the liability of the maker on the second half would be held valid at this day. The holder of the first half has good title and no notice; the holder of the second half has a bad title and notice. But it may be a question whether a half-note be for all purposes a negotiable instrument (d).

If a lost bill or note were in the hands of a party who had no right to retain it, as if, for example, it be still in the possession of the finder, or of a transferee, who has taken it from him under circumstances amounting to fraud, the true owner might bring an action of trover; or if it had been paid by the acceptor or maker to such wrongful holder, the amount was recoverable in an action for money had and received (e). And we have seen that if the maker or acceptor pay it improperly, the amount will not be allowed him in account with the payee or drawer (f).

Trover for
lost bill or
note.

Where a bill has been lost before it is overdue (g), the loser may apply to the drawer to give him a duplicate, giving, if required, security to the drawer to indemnify him against all persons in case it be found. The drawer may be compelled to give such duplicate (h).

Application
for duplicate.

(c) *Mayor v. Johnson*, 3 Camp. 324; *Musson v. Eaden*, 16 Ves. 430.

(d) The Bank of England have always been in the habit of paying half-notes on an indemnity. And it has been held that the provisions of the Common Law Procedure Act, 1854, s. 87, apply to the case of half-notes. Per Willes, J., at Chambers. *Redmayne v. Burton*, 9 Jur. 21; *Smith v. Monday*, 6 Jur. 977.

(e) *Down v. Halling*, 4 B. & C. 330; 6 D. & Ry. 455; 2 C. & P. 11; *Lorell v. Martin*, 4 Taunt. 799; 14 B. R. 668.

(f) As to the liability of a party wrongly paying, see ante, Chapter on PAYMENT.

(g) A transferee of an overdue bill or note is not a holder in due course (Code, s. 29 (a)), unless he can rely on a prior title (sub-sect. (3)).

(h) Code, ss. 69 and 70. If the loser obtain a judgment or order to that effect he may have the document on failure of compliance executed by a nominee of the Court, 47 & 48 Vict. c. 61, s. 14. The case of a destroyed bill is not mentioned in sect. 69; it seems always to have been treated

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Statutable
jurisdiction
of the Court.

In any action or proceeding on a bill or note the Court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or judge against the claims of any other person upon the instrument in question (*i*).

On whom loss
of a bill trans-
mitted by post
will fall.

When a debtor remits to his creditor a bill or note, by a conveyance which the creditor directs, or by post, if the creditor have expressly or impliedly authorized him so to do, and the bill or note be lost or stolen, the loss will fall on the party to whom it was intended to be remitted (*k*).

Presumption
as to stamp.

The presumption of law is that a lost or destroyed bill or note was duly stamped, unless the contrary be shown (*l*).

as equivalent to a loss; intentional destruction might be cancellation under sect. 63 (1), but not so if done by mistake or accident, subsect. 3. Code, s. 89 apparently extends these provisions *mutatis mutandis* to promissory notes. This power to obtain a duplicate, first given in the case of *inland* bills by 9 & 10 Will. 3, c. 17, s. 3 (now repealed), is not peculiar to the law of England, but agreeable to the mercantile law of other countries. Code de Com. I. tit. 9, art. 151; Ordonnance de Com. de Louis XIV., tit. 5, art. 9. Courts of common law seem to have had no jurisdiction under this statute (*Bromley v. Holland*, 7 Ves. 20 and 249; 6 R. R. 58), but ample scope was given to it in Courts of equity, both on bills before due and after, and on notes as well, *Ex parte Greenway*, 6 Ves. 812; *Mossop v. Eaden*, 16 Ves. 430; and as against the acceptor or indorsers as well as the drawer on a satisfactory indemnity being given. Byles on Bills, 6th American ed. 565. As these words are general, they should seem to apply to all Courts of competent

jurisdiction, see Annual County Court Practice, ed. 1899, Vol. 1, 485.

(*i*) Code, s. 70. The 17 & 18 Vict. c. 125, s. 87, preserved by 38 & 39 Vict. c. 77, s. 21, gave a nearly similar provision for England; and the 19 & 20 Vict. c. 102, s. 90, for Ireland. Bank notes are within this Act, *McDonnell v. Murray*, 9 Irish C. L. R. 495; and half notes, per Willes, J., at Chambers, *Redmayne v. Burton*, 9 Jur. 21; and circular notes, see ante, p. 111. In case of neglect to give an indemnity, the plaintiff has been ordered to pay the defendant's costs up to the time of so doing. *King v. Zimmerman*, L. R. 6 C. P. 466; 40 L. J., C. P. 278.

(*k*) *Warwick v. Noakes*, 1 Peake, 98; 3 R. R. 653; *Norman v. Ricketts*, 2 Times Rep. 607; *Pennington v. Crossley*, 77 L. T. 43, citing *Charles v. Blackwell*, 2 C. P. D. 157. So miscarriage in the post office will not prejudice a notice of dishonour, ante, p. 230.

(*l*) *Marine Insurance Co. v. Haviside*, L. R., 5 H. L. Cas. 625; and see ante, p. 134.

CHAPTER XXVI.

OF THE LEGAL REMEDIES FOR AND AGAINST PARTIES TO A BILL OR NOTE.

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BEFORE passing to the remedy by action on the bill, it is desirable to notice certain collateral remedies incidental to the position of the parties.

And firstly, cases may arise in which the bill needs rectification (*a*); or in which the due signature, indorsement (*b*) or delivery (*c*) of a bill by one of the parties may be necessary to complete the contract, and give to another party his full rights upon the bill. In such a case, provided that no adequate relief could be obtained in damages (*d*),

I. COLLATERAL REMEDIES.

To obtain
rectification
or compel
completion of
contract.

(*a*) *Druiff v. Lord Parker*, L. R. 5 Eq. 131; 37 L. J., Ch. 241.

(*b*) See Code, s. 31 (4).

(*c*) Code, ss. 2, 21.

(*d*) See, for example, *Ex parte Masterman*, 4 Dea. & Ch. 751; 2 Mont. & A. 209; 4 L. J., N. S., Bkcy. 54.

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the Court might be disposed, in order to avoid irreparable loss, to order the recusant party to perform his part (*e*). So, if the refusal be a breach of trust, he may be ordered to do the specific acts necessary to the discharge of his duty (*f*). And a judgment (*g*) or order (*h*) requiring any person to do any act other than the payment of money may be enforced by writ of attachment or committal. It is desirable to have a day specified in the judgment or order for doing the act to avoid delay in enforcing it (*i*). It is now further provided (*k*), that if a mandatory order for the specific performance of any contract be not complied with, the Court may direct that the act required be done by some other person at the expense of the disobedient party. And by the Judicature Act, 1884 (*l*), where any person neglects or refuses to comply with a judgment or order to execute any document, or to indorse any negotiable instrument, the Court may order that such document shall be executed, or negotiable instrument be indorsed by such person as the Court may nominate, and the document so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it (*m*).

To recover possession of the bill.

Secondly, it may be that the bare possession of the instrument, as distinguished from the "delivery" necessary to complete the contract (*n*), is wrongfully withheld from the person entitled to be the holder. In such a case the aggrieved party might on a case of sufficient urgency or hardship obtain a mandatory order for the delivery to him of the document so wrongfully detained (*o*), or he may be left to the ordinary remedy by action in form corresponding to trover or detinue of former days.

Whether it be the mandatory order, or an ordinary judgment in the action that is obtained, execution may be by

(*e*) See as to delivery, *Doloret v. Rothschild*, 1 Sim. & S. 590; 24 R. R. 243; and cf. *Nutbrown v. Thornton*, 10 Ves. 151; *Cud v. Rutter*, 1 P. W. 570.

(*f*) *Wood v. Rowcliffe*, 3 Ha. 304.

(*g*) Ord. XLII. r. 7.

(*h*) Ibid. r. 24.

(*i*) *Gilbert v. Endran*, 9 Ch. D. at p. 266.

(*k*) Ord. XLII. r. 30.

(*l*) Sect. 14.

(*m*) As to decree declaring

defendant bound to indemnify plaintiff against all loss on a lost bill, and directing defendant within a given time to take up such bill, and pay the amount due thereon, see *Seton*, 1908; *Goodier v. Lake*, 1 Atk. 446.

(*n*) Code, s. 21, prov.

(*o*) As to the principles on which the Court acts in decreeing delivery of specific personalty, whether the claim rest on tort, trust or contract, see *Fry*, Sp. Perf. 3rd ed. par. 73—89.

writ of delivery without giving the defendant the option of retaining the property upon paying the value assessed (*p*). And the plaintiff may by the same writ have levied the damages and costs awarded and interest (*q*).

If, however, judgment in the action be in the alternative form, and the defendant elects to pay the value assessed, and retain the bill, it has been held that the effect of his doing so, is to divest the property out of the plaintiff, and to vest it in the defendant (*r*) as against the plaintiff (*s*), and that from the period of the conversion (*t*).

A payer for honour on paying to the holder the amount of the bill and the notarial expenses is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up, he is liable by the express terms of the Code (*u*) to the payer for honour in damages.

Although the plaintiff should fail in an action of trover, or, it is presumed, in an action for damages under the provision just referred to, he might nevertheless succeed in an application to have the bill delivered up to be cancelled, since the relief in this case might depend upon different grounds (*x*).

And this brings us to the third class of cases in which relief is afforded between the parties collateral to their rights and liabilities on the bill. It is now established by a long series of decisions that the Court has jurisdiction

To restrain completion, negotiation or enforcement of contract.

(*p*) Ord. XLVIII. r. 1.

(*q*) Ibid. r. 2.

(*r*) See *Holmes v. Wilson*, 10 Ad. & E. 511; *Cooper v. Willomatt*, 1 C. B. 672.

(*s*) *Cooper v. Shepherd*, 3 C. B. 266.

(*t*) *Buckland v. Johnson*, 15 C. B. 145. In the case of an ordinary chattel the plaintiff (having taken no steps to follow up an interlocutory judgment signed for want of plea) was allowed to waive the judgment, and to recover the chattel from defendant's *bond fide* transferee for value in a fresh action. *Marston v. Phillips*, 9 L. T., N. S. 289, but a "holder in due course" would probably be protected from such a claim.

(*u*) Sect. 68 (6).

(*x*) In *Lisle v. Liddle*, 3 Anstr. 649, the plaintiff insurer gave promissory notes to the assured

for the amount of the insurance; but afterwards resisted an action at law by the assured payee, on the ground of fraud; it was held, that his having established the invalidity of the notes at law was no defence to a bill in equity for their delivery up and cancellation, but rather a ground for allowing the prayer. And, since the Judicature Acts, the verdict would probably be followed by an order for their cancellation, or, if the proceedings were commenced in the Chancery Division for the delivery up, and an issue was directed at law on the fraud, and found for the plaintiff, the Court, on return of the issue so found, would now make the order. See *Thompson, B.*, at p. 650. See, too, cases referred to in notes to *Ryan v. Mackmath*, 3 Brown's Rep. at pp. 16, 17; and ante, Chapter TRANSFER, p. 210.

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quia timet to restrain the indorsement, negotiation, or assignment of negotiable instruments wherever they have been obtained, or are held fraudulently or inequitably; the Court will also grant an injunction to restrain the putting in suit of such bills if applied to before they have passed to a holder in due course (*y*).

If the right of the applicant does not conclusively appear, or is dependent upon some issue which should be first determined, or on some condition which is unfulfilled, the order will be interlocutory or *ad interim*, that is, pending the trial of the issue or the happening of the condition, and is granted upon the applicant's undertaking, in the event of the injunction being ultimately dissolved, to pay any damages (*z*) which the Court thinks the opposite party may be entitled to for the restraint placed upon him in the interval.

If the right of the applicant is clear in the first instance, or there is no longer ground for the order being delayed, or where, though the parties are *in pari delicto*, yet public policy requires that the transaction should be quashed, *e.g.*, gambling debt (*a*), the injunction would be made perpetual to restrain absolutely the indorsement, transfer, negotiation, acceptance or assignment, or putting in suit (as the case might be) of the negotiable instrument. And in such case if there is any such danger of the instrument passing into the hands of a holder in due course, and so becoming a cause of action, or of its being used as a means of vexatious litigation, the Court will go further and direct its delivery up for cancellation. If a note sued upon were shown to have been given for others which had not been surrendered, the Court, in giving judgment for plaintiff, would probably order the others to be delivered up for cancellation, and, in an American case, judgment was suspended till the original two notes were filed (*b*). But if the instrument is void on the face of it, it seems now established that the Court will not require its delivery up, as the danger cannot arise (*c*).

And generally, where the rules of judicial equity required, the Court would restrain an action on the bill, or the defendant in an action from availing himself of a legal defence (*d*).

(*y*) Ante, p. 209; *Hawkins v. Troup*, 7 T. L. R. 104.

(*z*) *Graham v. Campbell*, 9 Ch. D. 490; *Smith v. Day*, 21 Ch. D. 421; *Griffith v. Blake*, 53 L. J., Ch. 955.

(*a*) *E. of Milltown v. Stewart*,

3 My. & Cr. 18.

(*b*) *Raisin v. Thomas*, 88 N. C. 148.

(*c*) *Simpson v. Id. Howden*, 3 My. & Cr. 97.

(*d*) See *Queen of Portugal v. Glynn*, 1 West, 258; *Glynn v.*

Though the jurisdiction and the principles on which it is exercised are illustrated by the cases above referred to, certain modifications in the mode of its exercise were introduced by the Judicature Acts in 1875.

Prior to that time, though equitable pleas (*e*) had been admitted, and power to enjoin in patent (*f*) and some other (*g*) cases had been given to the Common Law Courts (but only after injury had arisen), the granting of injunctions remained virtually the exclusive function of the Court of Chancery.

But the Judicature Act, 1873 (*h*), fused law and equity (*i*) and vested in the High Court the whole jurisdiction of the

Soares, 3 M. & K. 450; *Hodgson v. Murray*, 2 Sim. 515; *Hood v. Ashton*, 1 Russ. 412; 25 R.R. 93; *Kidson v. Dilworth*, 5 Price, 564; 19 R. R. 656; *Druiff v. Lord Parker*, L. R., 5 Eq. 131; 37 L. J., Ch. 241; *Prothero v. Phelps*, 25 L. J., Ch. 105; *Agra and Masterman's Bank v. Hoffman*, 34 L. J., Ch. 285.

(*e*) Where the defendant in an action would if judgment were obtained be entitled to relief upon equitable grounds, he was enabled by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 84), to plead the facts which entitled him to such equitable relief by way of defence. This was the first step towards the complete fusion to be hereafter noticed. Restrictions were placed by judicial decision on the exercise of this power, which left circuitry in many instances unremedied. Such a plea was only allowed where final justice could be done by the Court of law in the pending action. *Wodehouse v. Farebrother*, 25 L. J., Q. B. 18; 5 E. & B. 277; *Wood v. Copper Miners' Company*, 17 C. B. 561; *Clarke v. Laurie*, 26 L. J., Exch. 38; *Drain v. Harrey*, 17 C. B. 257; but see *Chilton v. Charrington*, 24 L. J., C. P. 153. And a defendant having so pleaded was not precluded from resorting to a Court of equity. *Evans v. Bremridge*, 2 Jur., New Series, 134; 25 L. J., Ch. 334; *Prothero v. Phelps*, 25 L. J., Ch. 105. But
B.B.E.

see *Terrell v. Higgs*, 26 L. J., Ch. 837.

(*f*) 15 & 16 Vict. c. 83, s. 42.

(*g*) 17 & 18 Vict. c. 125, ss. 79—82; amended by C. L. P. Act, 1860, ss. 32, 33.

(*h*) 36 & 37 Vict. c. 66, s. 16.

(*i*) Sect. 24, sub-s. 1, provides for the giving effect by the High Court and Court of Appeal to every equitable claim of relief by a plaintiff or petitioner, and sub-s. 2 for the like in respect of equitable relief claimed by defendants. And under this subsection any Division will give effect to such equitable grounds, at least so far as to allow them as a defence to the action (*Mostyn v. West Mostyn Coal Co.*, 45 L. J., C. P. 401; 1 C. P. D. 145), or, if it be a division other than the Chancery Division, transfer the action to the Chancery Division under Ord. XLIX. r. 3. *Holloway v. York*, 2 Ex. D. 333 C. A.; *Hillman v. Mayhew*, 1 Ex. D. 132. And transfer was refused, though rectification claimed, in *Story v. Waddle*, 4 Q. B. D. 289. See, too, *Standard Discount Co. v. Barton*, 37 L. T. 581; *Mostyn v. West Mostyn Coal Co.*, 1 C. P. D. 145; *Clements v. Morris*, W. N. 1878, p. 4. See, also, *Hughes v. Metropolitan Railway*, 1 C. P. D. 120, 131, C. A.; *Eyre v. Hughes*, 2 Ch. D. 148; *Marshall v. Marshall*, 5 P. D. 19.

Equitable relief by counter-claim can now, in like manner,

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Court of Chancery, including therefore the power to grant interim, interlocutory and perpetual injunctions (*k*).

Defence in
lieu of injunc-
tion.

Circuity and multiplicity are, in future, to be avoided, and the Court which has seisin of the action will, irrespective of the division in which it has been commenced, so far as practicable, give effect to all claims and defences, including, in the latter term, those equitable grounds of interference upon which formerly the action could have been restrained by injunction. But it is still in the power of the Court in which the action is pending, where necessary, upon motion in a summary way, to order a stay of proceedings (*l*).

be given if properly claimed on the pleadings, and as to third parties if proper notice be given. Jud. Act, 1873, s. 24, sub-s. 3; and all equities appearing incidentally in the course of the case shall be duly recognised as completely as in a Court of equity before the Act. Ibid. sub-s. 4. And the objectionable process of staying proceedings in one superior Court by prohibition or injunction issuing from another is abolished, and every matter of equity on which such an injunction might formerly have been obtained, either unconditionally or on any terms or conditions, may be relied on by way of defence. Ibid. sub-s. 5. And, so far as possible, all matters in controversy between the parties are to be completely and finally determined, and all multiplicity of legal proceedings concerning such matter avoided. Ibid. sub-s. 7. And, generally, wherever there is a conflict or variance between the rules of equity and those of common law as to the same matter, the rules of equity are to prevail. It must be remembered, however, that this relates only to matters of substantive law. In matters of procedure, convenience is the guide. *Newbiggin-by-the-Sea Gas Co. v. Armstrong*, 49 L. J., Ch. 231; 13 Ch. D. 310, C. A.

(*k*) But with respect to interlocutory injunctions, it is enacted

(36 & 37 Vict. c. 66, s. 25, sub-s. (8)), that an injunction may be granted by an interlocutory order in all cases in which, and upon such terms or conditions (if any), as the Court shall think just and fit. And the discretion given by this sub-section must of course be exercised with due regard to the principles already established in the Courts whose jurisdiction is vested in the High Court. See *Gaskin v. Bell*, 13 Ch. D. 324.

The application is not generally made *ex parte* (Ord. L. r. 6; LII. r. 6) under this sub-section, but it may be so made if injury is imminent. *Meluish v. Melton*, 24 W. R. 679; *Henning v. Bohmann*, W. N. 1877, p. 14. Where there is no immediate urgency the application should be made on notice, and the matter being then fairly argued, can by consent be treated as conclusive of the question in the action, and a final injunction taken in the first instance. *Aslatt v. Corporation of Southampton*, 16 Ch. D. 143; 50 L. J., Ch. 201.

(*l*) Jud. Act, 1873, s. 24, sub-s. 5. As to the power of the County Court in giving effect to equitable claims and defences, and granting summary relief, see Jud. Act, 1873, s. 89, which has been held to extend to the granting of an injunction (*Martin v. Bannister*, 4 Q. B. D. 491); and the language would seem wide enough to include the other forms of

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We have already noticed the liability of a banker to his customer for improperly refusing to honour the latter's cheques (*m*), and to the rightful owner of a crossed cheque for paying it in disregard of the crossing (*n*), the equitable distribution of loss on an over-held cheque when the bank fails in the interim, the holder proving instead of the drawer (*o*), and the effect as an assignment in Scotland of presentment to the drawee having funds available of a bill or cheque, the holder then presumably being able to compel payment (*p*), and the power to require a duplicate of a lost bill.

Other claims arising out of a bill.

By Code, s. 58, a transferor by delivery of a bill or note warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of the transfer he is not aware of any fact which renders it valueless (*q*).

Transfer by delivery.

So that an action for breach of the warranty in respect of all or any of these particulars will lie at the suit of the transferee.

And lastly, before passing to action on the bill we must remember that when a bill is dishonoured the holder has his

Action on the consideration.

incidental relief obtainable in the High Court; *quære*, if that be all that is claimed. See also C. C. R. 1889, Ord. XXII. r. 12. Whatever order it has power to make, whether interlocutory or final, it can enforce by committal by virtue of the above section 89 of the Jud. Act. 1873. *Richards v. Cullerne*, 7 Q. B. D. 623.

(*m*) Ante, p. 19.

(*n*) Ante, p. 31; Code, s. 79 (2).

(*o*) Ante, p. 19; Code, s. 74.

(*p*) Code, s. 53 (2).

(*q*) See *Gompertz v. Bartlett*, 23 L. J., Ex. 68. Although the transfer by delivery of a bill for value resembles to some extent a sale, yet (ante, pp. 187 and 191), a greater liability attaches to a transferor under the section cited in the text than to the seller of a bill. As to the thing sold being what it purports to be, there is no such general liability as here declared to exist in the case of bills of exchange transferred by delivery and negotiated by the

transferor. On the contrary, "*carcat emptor*" is the rule, though subject to exceptions arising from the precise position of the parties towards each other and the subject-matter. *Jones v. Just*, L. R., 3 Q. B. 197. Where the fact that the article exchanged for value is valueless is known to the vendor or transferor at the time of sale or transfer, the suppression is sufficient to make all that is disclosed a misrepresentation and a fraud. And in America the doctrine applicable in such case to bills and notes, whether sold or transferred (see ante, pp. 188 and 191), has been expressly applied to goods sold. *Paddock v. Strobbridge*, 29 Verm. 470. But, generally, in the case of sale of goods, to hold the vendor responsible for a defect which to his knowledge rendered the goods less valuable than he knew the vendee thought them, it would be necessary to show something amounting to a positive misrepre-

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option to sue on the bill or on the consideration, except as previously noticed in the case of transferor by delivery, who is not generally liable on either (*ante*, pp. 187 and 191). But it is advisable to sue on the bill; first, because it reduces the debt to a certainty; secondly, because less evidence is necessary; thirdly, because in an action on the bill proof of payment of the bill lies on the defendant; but in an action on the consideration only, if the defendant show that a bill was given, the plaintiff must prove that the bill was *not* paid (*r*).

The safest course is to sue upon both (*s*); as might have been done formerly (*t*).

II.
ACTION ON
THE BILL OR
NOTE.

In High
Court or
County
Court.

And this brings us to action on the bill, which may be either in the High Court or in the County Court. The principles which apply to the proceedings in the High Court are for the most part common to an action in the inferior Court, in respect, for instance, of the right to sue, the liability to be sued, the joinder of plaintiffs, defendants and third parties, and joinder of causes of action. By the County Court Rules, 1889, the County Court procedure has been closely assimilated to that under the Supreme Court Rules, 1883.

The jurisdiction of the County Court in actions on contract such as bills or notes is, by sect. 56 of the Act of 1888, limited to 50l.; but the plaintiff may forego the excess should his claim exceed that amount and so come within the jurisdiction. By sect. 65, cases may be remitted from the High Court to the County Court on the application of either party (if for liquidated sums) when the claim does not exceed or has been reduced by payment or set-off or otherwise to 100l. Should both parties consent in writing, the limit may be waived altogether. By sect. 62, cases involving important points of law may be remitted to the High Court.

Division of
the subject.

The subject of action will, therefore, in the text be considered primarily in reference to the High Court, and under the following heads:—Parties—Causes of Action—Venue—Procedure, Summary and Ordinary—Pleading—Consolidation of Actions—Trial—Evidence—Damages (including interest, re-exchange and costs recovered)—Costs—Judgment—Execution.

sentation. *Smith v. Hughes*,
L. R., 6 Q. B. 597; and see Sale
of Goods Act, 1893, c. 71, s. 14.

(*r*) *Hebden v. Hartsink*, 4 Esp.

46; *Bishop v. Rowe*, 3 M. & S. 362.

(*s*) See post, joinder of causes
of action.

(*t*) *Ryder v. Ellis*, 8 C. & P. 357.

And where any matters affecting peculiarly the County Court seem to require notice, as, for instance, the survival in that tribunal of the summary procedure under the Bills of Exchange Act, 1855, reference will be made thereto in the notes.

The subjects of limitations and lost bill it has been thought desirable to treat in separate chapters.

The holder of the bill at the time of action brought, *i.e.*, the person who is then entitled to receive its contents, is the only person who can then sue on it (*u*). WHO MAY
SUE.

It is a good defence, that at the time of action commenced the bill was outstanding in the hands of an indorsee. But if such indorsee held the bill as an agent or trustee for the plaintiff, the plaintiff may sue, though not in actual possession of the bill (*x*), even though the agent's authority depend on a ratification after action brought (*y*). An indorser who pays an indorsee has no right to sue a prior party in the name of the indorsee without his consent, and the Court has allowed the defendant, as well as the indorsee, whose name has been usurped, to raise the objection (*z*).

Primâ facie any person may sue in his or her own right on a bill.

But an outlaw (*a*) or an alien, whose country is actually at war with the Queen (*b*), or a felon, is absolutely incapacitated from suing in this country. A representative is, however, now provided for felons (*c*).

An infant may sue in the High Court by his next friend ; must in County Court (*d*).

A lunatic by his committee, or, if not so found on commission, by next friend (*e*).

(*u*) *Emmett v. Tottenham*, 8 Ex. 884 ; *Gill v. Lord Chesterfield*, *ib.* ; and see *Jungbluth v. Way*, 25 L. J., Exch. 257 ; 1 H. & N. 71 ; *Davis v. Reilly*, [1898] 1 Q. B. 1 ; *Nash v. De Freville*, 15 T. L. R. 264. And though in *Pownal v. Ferrand*, 6 B. & C. 439, under special circumstances an indorser, who had been compelled by action to pay 40*l.* on account, was held entitled to recover it against the acceptor ; yet this was not in an action on the bill, but as money paid to defendant's use.

(*x*) *Stones v. Butt*, 2 C. & M. 416 ; 2 Dowl. P. C. 335 ; *Dabbs v. Humphries*, 10 Bing. 446 ; 1

Scott, 325 ; 4 Moore & S. 285 ; *Ancona v. Marks*, 7 H. & N. 686 ; *National Savings Bank v. Tranah*, L. R., 2 C. P. 556 ; 36 L. J. 260.

(*y*) *Ancona v. Marks*, *ubi supra*.

(*z*) *Coleman v. Bredman*, 7 C. B. 871 ; but see *Doe d. Vine v. Figgins*, 3 Taunt. 440.

(*a*) *Walker v. Thellusson*, 1 D., N. S. 578.

(*b*) *Aleinous v. Nigreu*, 4 E. & B. 217.

(*c*) 33 & 34 Vict. c. 23.

(*d*) Ord. XVI. rr. 16, 20, 21. Ord. V. 11A, C. C. 1899.

(*e*) *Id.* rr. 17, 20.

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A married woman, having separate property and contracting with respect thereto, may now sue as completely as a *feme sole* (*f*).

And where the person who would otherwise be the holder has died (1) leaving a will, or (2) intestate, or (3) is bankrupt, or (4) convicted of felony, or (5) is an execution debtor, and the bill has been seized in execution; in such case (1) his executor, or (2) administrator, or (3) trustee in bankruptcy, or (4) curator *ad interim* or administrator, or (5) the sheriff or other proper officer, may sue upon the bill in his own name though in his representative capacity.

JOINDER OF
PLAINTIFFS.

By R.S.C. 1883 and 1896, Ord. XVI. r. 1, subject to costs, "all persons may be joined in one action as plaintiffs, in whom any right to relief in respect of, or arising out of, the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise"; and (Id. r. 11) no cause or matter is to be defeated by reason of misjoinder or non-joinder of parties, the Court having full power to amend on terms (Id. r. 11), either on summons before trial or at trial, in a summary manner (Id. r. 12) (*g*).

Corporations
aggregate.

Corporations aggregate must sue and be sued in their corporate name, since the corporation is in law a different entity from the individuals composing it (*h*).

Public officer.

Companies are sometimes empowered to sue and be sued by their public officer (*i*).

Liquidators.

Official liquidators may bring or defend any action in the name or on behalf of the company with the sanction of the Court or committee of inspection (*k*). Voluntary liquidators may do so without such sanction (*l*).

(*f*) Ord. XVI. r. 16, and 45 & 46 Vict. c. 75, s. 1 (2).

(*g*) *Universities of Oxford and Cambridge v. Gill*, [1899] 1 Ch. 55; citing *Stroud v. Lawson*, [1898] 2 Q. B. 44. As to County Courts, see C. C. Rules, 1889, Ord. III. r. 1 (a) and Ord. XIV.

(*h*) *In re Hodges*, L. R., 8 Ch. Ap. 204; *Pilbrow v. Pilbrow's Atmospheric Ry. Co.*, 3 C. B. 730; R. S. C. 1883, Ord. IX. r. 8.

Comp. Act. 1862, s. 62.

(*i*) As to these companies, see Lindley, L.J., on Company Law, 5th ed., pp. 265, 561. *McDowell v. Doyle*, 7 Ir. Com. Law Rep. 598.

(*k*) Comp. Act, 1862, s. 95; Act, 1890, s. 12 (1), the Companies Winding-up Act.

(*l*) Act of 1862, s. 133 (7); Lindley, L.J., Company Law, 5th ed. 880, note (*a*).

Partnerships and firms not incorporated are now permitted to sue in the name of the partnership or firm. But the defendant can obtain the names of the members at the time when the cause of action accrued, by an application (*m*).

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Partnerships
and firms.

Primâ facie any person may be sued, and outlaws, aliens whose nation is at war with the Queen, and felons are not exempt from this liability though deprived of the right to sue. Prior to 33 & 34 Vict. c. 23, however, the conviction of a felon worked a forfeiture of his property, and there was no object in suing him. That act abolished forfeiture of property for felony, and at the same time provided for its custody and control by a representative during sentence, and gave a right to sue that representative.

WHO MAY BE
SUED.

Outlaws,
aliens, felons.

Though an infant may be sued and will, under certain circumstances (*n*), be held liable on his contracts, yet this liability does not extend to bills of exchange (*o*).

Infant cannot
be sued on
bill.

A lunatic may be sued.

Service of the writ on his committee or on the person with whom he resides, or under whose care he is, will be sufficient, unless the Court or judge otherwise orders (*p*).

A lunatic appears personally or by attorney, but defends by his committee or guardian *ad litem*, and the plaintiff may, if necessary, apply to have the guardian appointed (*q*).

Since January 1, 1883, a married woman may be sued as if she were a *feme sole*, upon contracts in respect of and to the extent of her separate estate, without joinder of her husband as defendant (*r*).

(*m*) Ord. XLVIII. (a), R. S. C. 1891; and Ord. III. C. C. Rules, 1892, rr. 13 (a), 14 (a).

(*n*) See capacity of parties, ante, p. 67.

(*o*) In *Belfast Bank v. Doherty*, ante, p. 69 (*l*), O'Brien and Fitzgerald, JJ., thought it might be a material allegation to the defence to aver that the original bill was not for necessities; but this case seems within the Act of 1892, s. 5. In *Bateman v. Kingston*, 6 L. R. (Ir.), 328, Lawson, J., while holding void a bill given for a loan to be laid out in necessities, considered there might be liability on a bill or note given for necessities previously supplied. But see Code, s. 22 (2); and it has now been

declared by the Court of Appeal that a bill given in payment for necessities is not a contract for necessities, and that an infant is absolutely incapable of contracting by bill or note, his only liability, if any, being upon the consideration. *In re Soltykoff*, [1891] 1 Q. B. 413.

(*p*) Ord. IX. r. 5.

(*q*) Dan. Ch. Pr.

(*r*) Ord. XVI. r. 16; 45 & 46 Vict. c. 76, s. 1 (2). As to proceedings under Ord. XIV. see formerly *Ortner v. Fitzgibbon*, 50 L. J., Ch. 17; *Durrant v. Ricketts*, 8 Q. B. D. 178; and now *Gunston v. Maynard*, L. T., June 9th, 1883, p. 102. A form of judgment is given in *Scott v. Morley*, 20 Q. B. D. p. 132.

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And when the person who would otherwise be the defendant is (1) dead, leaving a will, or (2) intestate, or (3) convicted of felony, in such case (1) his executor or (2) administrator, or (3) curator *ad interim*, or administrator, may be sued in his own name, but in his representative capacity.

JOINDER OF
DEFENDANTS.

By R. S. C. 1883, Ord. XVI. r. 4, all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, and judgment given against such one or more of the defendants as may be found liable accordingly, and without amendment. But a substantial, not a mere technical, satisfaction of the debt by any one will discharge all subsequent parties (*s*).

By r. 5 of the same Order, it is not necessary that each defendant should be interested as to all the relief prayed for ; and by r. 6, the plaintiff may, at his option, join as parties to the same action all or any of the parties severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory note ; while r. 7 provides for joinder of several defendants in cases of doubt. And r. 11 affords security against miscarriage of justice by reason of nonjoinder or misjoinder of defendants.

Where defendant liable in more than one capacity on same bill.

Formerly, if a party were liable on a bill in two or more capacities, he might be the object of several actions on the same bill at the suit of the same plaintiff. Thus, where a party was sued jointly with others, as a drawer, and separately as the acceptor, of a bill, the Court, considering him liable in the two characters, and the plaintiff entitled to both remedies which could not be comprised in the same declaration, refused to stay the proceedings in either as vexatious (*t*).

Under the above-mentioned rules as to parties, and the rules hereafter to be mentioned as to joinder of causes of action, one action would probably be deemed sufficient now to adjust the right of the parties.

Corporations, partnerships and firms.

Corporations aggregate, partnerships and firms are in the same position *mutatis mutandis* as to being sued as they are in respect of suing (*u*).

(*s*) See post, costs as damages ;
Windham v. Wither, 1 Stra. 515 ;
Ex parte Wildman, 2 Ves. sen.
p. 115.

(*t*) *Wise v. Prowse*, 9 Price,
393.

(*u*) Ante, pp. 81 and 406. The
prudent course seems to be to

We have seen that the plaintiff may, at his option, join, as defendants, all or any of the parties liable to him on a bill or note. But even if he should not avail himself of this power in respect of some party to the bill who, though liable to the plaintiff as a principal, is liable to one of the defendants as co-surety for contribution, it may be desirable for such defendant to claim his remedy over against his co-surety on the bill, and so if the contract of suretyship arises collaterally to the bill (*x*). And so, too, a person whether liable to the plaintiff as a principal on the bill (*y*), or a stranger to the bill (*z*), may nevertheless be liable to a defendant for the whole amount which he may have to pay on the bill, by reason of a contract to indemnify such defendant as between themselves.

In each of these cases, there was, prior to the Judicature Acts, no less circuitous method for the original defendant than that of bringing a separate action against the person from whom he claimed contribution or indemnity. A surety sued may now, however, by proper notice and other steps bring his co-surety to the trial as a third party, and complete justice may be done by one hearing and one judgment, giving effect to the rights of all parties. And so if the acceptor of a bill accepted for accommodation of the drawer should be sued by the holder in due course, he may be saved the circuitry of suing the drawer against whom he has a claim for indemnity by making him a third party to the original action, and judgment may be given for the plaintiff against the defendant, and for the defendant against the third party (*a*). But the plaintiff is not to be

sue the partners *nominatim* if their names are known; if not, to sue the firm and apply under Ord. XLVIII. A, for disclosure of their names, and then amend the writ by inserting the names. See *Munster v. Cox*, 10 App. Cas. 680; 55 L. J., Q. B. 108; Code, s. 23 (2).

(*x*) *Brittain v. Lloyd*, 14 M. & W. 762; *Lewis v. Campbell*, 8 C. B. 541; *Reynolds v. Wheeler*, 10 C. B., N. S. 561; 30 L. J., C. P. 350.

(*y*) *Batson v. King*, 28 L. J., Ex. 327; 4 H. & N. 739.

(*z*) *Wilder v. Dudlow*, L. R., 19 Eq. 198.

(*a*) See Ord. XVI. rr. 48 et seq. It is to be observed, that the scope of the third party procedure was

materially contracted under the Rules of the Supreme Court, 1883. Under the wide terms of sect. 24, sub-s. 3 of the Jud. Act, 1873, the Rules of 1875 were so drawn as to admit of any person being made a third party against whom the defendant claimed contribution or indemnity, or any other remedy or relief over, or where there was any question in the action which it appeared desirable to settle, not only as between the plaintiff and defendant, but as between the defendant and a third party. By the present Rules, the right is restricted to contribution and indemnity. But whereas under the former Rules a mere *decision* of the controverted point was obtained,

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embarrassed in his trial by the introduction of complicated issues between the defendant and a third party, and therefore the power is to be exercised subject to the discretion of the Court (*b*).

Fourth party.

Though, if no such inconvenience is to be apprehended, the Court will sometimes, to avoid circuity, permit the third party to bring in yet another against whom he claims contribution or indemnity (*c*).

JOINDER OF
CAUSES OF
ACTION.

As to joinder of causes of action, we have already seen (*d*) that where a bill is dishonoured the holder has the option, and may deem it desirable, to sue upon the consideration as well as upon the bill.

In the Rules of Supreme Court, 1875, a form was provided (*e*) for a statement of claim on the bill, and also on the consideration.

But while under the Rules of 1883, any such form would now be bad for prolixity, and it is required (*f*) that in actions on bills of exchange, the Forms in Appendix C. Sect. 4, shall be imitated, yet a claim "on the consideration as a substantive ground of claim" is expressly recognized in Ord. XIX. r. 25, and it is conceived, there is nothing to prevent a claim on the consideration being joined (with appropriate brevity) to the claim on the bill, and if the claim on the consideration is a liquidated demand, represented by the sum claimable on the bill, it could be joined in the special indorsement under Ord. III., and the summary process under Ord. XIV. followed. If struck out [Ord. XIV. r. 1 (*b*)], the rest would not be invalidated. There might be a difficulty, however, as to the item for interest; see the judgment of Lord Coleridge, C.J., in *Sheba Gold Mine Co. v. Trubshawe*, [1892] 1 Q. B. 680.

And though, under the Bills of Exchange Act, 1855, no other claims but those on the bill and the consideration could be joined, yet, in the summary procedure, under Ords. III. and XIV., which now, in the High Court, supersedes that under the Bills of Exchange Act, 1855, there is no such restriction. So that, at present, any other demands,

so far as the third party was concerned, power is now given in the cases to which the procedure is restricted to give judgment, for the defendant against the third party, in the original action.

With respect to County Courts, see sect. 89 of the Jud. Act, 1873,

and C. C. R. 1889, Ord. XI.

(*b*) *Wye Valley Rail. Co. v. Hawes*, 16 Ch. D. 489.

(*c*) *Witham v. Vane*, 49 L. J., Ch. 242.

(*d*) Ante, p. 403.

(*e*) Appendix C., Form No. 7.

(*f*) Ord. XIX. r. 5.

if they be liquidated, may be joined and recovered by the same summary process, unless leave is given to defend as hereafter mentioned. For, under the Supreme Court Rules (*g*), the plaintiff has the widest latitude in joining causes of action, subject, if he wishes to proceed summarily, to their being liquidated demands, and in all cases to the discretion of the Court as to whether they can conveniently be tried or disposed of together (*h*), and to certain considerations of convenience turning chiefly upon the particular class of persons concerned (*i*).

The venue in actions on specialties, bills and notes, was transitory, independent of the Judicature Acts and Rules, though subject to change, on special grounds, by the Court (*k*). But now all venues are transitory, except where otherwise provided by statute; and unless otherwise ordered by the Court or judge, the case will be tried in the county or place named by the plaintiff in the statement of claim or special indorsement, or where no statement of claim is delivered or required, in a notice to be served on the defendant (*l*).

The sole summary procedure now in force in the High Court as well for bills of exchange as other liquidated demands is under Ords. III. and XIV. It is a development of the system found so efficacious for enforcing negotiable instruments under Sir Henry Keating's Act, the Bills of Exchange Act, 1855; which was itself a modification of the summary procedure introduced a short time before by

(*g*) Ord. XVIII. r. 1.

(*h*) Ibid.

(*i*) Ibid. rr. 2—6.

(*k*) Tidd's Practice, 604; *Mon-
del v. Steele*, 8 M. & W. 640.

(*l*) Ord. XXX. r. 2; XXXVI. r. 1. The plaintiff is thus no longer *dominus litis*. Failing this, the venue is Middlesex. Ord. XX. r. 5. As to County Court venue, the rule is that the defendant is to be sued in the Court within the jurisdiction of which he lives or carries on business, though by leave the plaint may be entered in any other Court, within the jurisdiction of which defendant has lived or carried on business within six months, or any material part of the cause of action arose, such as

the acceptance, drawing, indorsement, delivery of any of these, the dishonour, or the receipt of notice of dishonour (C. C. Act, 1888, 51 & 52 Vict. c. 43, s. 74).

In the Metropolitan County Courts, if both plaintiff and defendant live or carry on business within the area, the plaint may be entered where either of them live or carry on business (s. 84).

In the Mayor's Court, which is a Court of inferior jurisdiction (*Mayor of London v. Cox*, L. R., 2 H. L. 239), the whole cause of action must arise within the jurisdiction (*Banque de Crédit v. De Gas*, L. R., 6 C. P. 142; *Wirth v. Austin*, L. R., 10 C. P. 689).

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the C. L. P. Act, 1852, for recovering ascertained money demands.

The various steps by which the present procedure has been arrived at are of historical interest, and a short account will be found in the note (*m*), as well as an outline of the procedure under the Bills of Exchange Act, 1855, which is

(*m*) The C. L. P. Act, 1852, among other important reforms, provided (sect. 25) that a writ for debt or liquidated demand, arising upon a contract, might, where the defendant was resident in the jurisdiction, be specially indorsed; and, in default of appearance, judgment might be signed. But as the defendant had only to withdraw from the jurisdiction when proceedings were threatened, or, being in the jurisdiction, to appear, and the action had to proceed in the ordinary way, this afforded an inadequate cure for the delays, so prejudicial to the promptitude called for, in the case of instruments regulating to a large extent the commerce and the currency of the country. Accordingly Sir Henry, better known to the commercial world as Mr. Justice Keating, introduced in 1855 the Bills of Exchange Act, which has since been associated with his name. By that Act the holder had the option, if he was prompt, of enforcing his bill in a summary way. For it was thereby enacted that all actions upon bills of exchange (including cheques, *Eyre v. Waller*, 5 H. & N. 460) or promissory notes, commenced within six months after same became due and payable, might be by writ in a special form, and indorsed in a particular way, as shown in a schedule to the Act. It was then made lawful, if the defendant did not obtain leave to defend in twelve days, and appear accordingly, for the plaintiff, on filing an affidavit of personal service of the writ, or of an order for leave to proceed, and a copy of the writ and indorsements, at once to sign final judgment on the writ, with interest at the rate

specified, if any, to the date of judgment, and a sum for costs.

But (sect. 2) if within twelve days from the service of the writ, the defendant paid into Court the sum indorsed on the writ, or if he could satisfy the judge upon affidavits that he had a legal or equitable defence, or ought to be allowed to put the plaintiff to proof of the consideration, or that his resistance was not frivolous or vexatious, or for delay, the judge was required to give leave to him to defend on such terms as to security as to the judge might seem fit. And (sect. 3) to provide against mistake, surprise or other hardship, power was given to the Court or a judge, "under special circumstances," even after judgment, to set aside the judgment, and stay or set aside the execution, and admit the defendant to defend upon just terms. And the rest of the proceedings, were assimilated to those of an ordinary action under the Common Law Procedure Acts then in force, but subsequently in a great measure superseded by the Jud. Acts, and now (with important exceptions) repealed by the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 49, Sched.).

By an Order in Council, dated 30th January, 1856, and made in pursuance of sect. 9 of the act, its provisions were extended to the County Courts established under 9 & 10 Vict. c. 95, in claims on bills or notes not exceeding 50*l*. (and by Order in Council, dated 27th July, 1863, confined to cases where claim is for 10*l*. or upwards).

As to the jurisdiction of the County Court by consent of the parties in writing, see 51 & 52 Vict. c. 43, s. 64.

still available to the plaintiff in the County Court, as will appear in the course of the account given below.

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In the High Court if the plaintiff's claim is simply for the amount of the bill, and the liquidated damages allowed under sect. 57 of the Bills of Exchange Act, 1882, with

In the High
Court.

On the experience of the working of the summary procedure under C. L. P. Act, 1852, ss. 25, 27, and the Bills of Exchange Act, 1855, the Judicature Commissioners, in 1869 (1st Report, 1869, p. 11), made recommendations to which effect was given by Ord. III. r. 6, and Ord. XIV. r. 1, of R. S. C. 1875. These extended the use of the specially indorsed writ, which had become familiar under C. L. P. Act, 1852, s. 25, to liquidated demands arising upon a trust as well as upon a contract, and made it immaterial whether the defendant was in or out of the jurisdiction. Sect. 27 of C. L. P. Act, 1852, was replaced by Order XIII., and this was supplemented by Order XIV., which enabled the plaintiff, even where the defendant appeared, to avoid delay by resorting to a course resembling (with the difference noted hereafter) that which had been found beneficial under the Bills of Exchange Act, 1855, viz., that of obtaining judgment unless the defendant satisfied the Court that he had a good defence or ought to be allowed to defend.

By Ord. II. r. 6, of 1875, the procedure under the Bills of Exchange Act was expressly kept alive, and from that time till October, 1883, when new rules came into force, the two summary procedures existed side by side. But there were important differences between them. For while under the Bills of Exchange Act the plaintiff was entitled to sign judgment if the defendant did not get leave to defend, yet the writ was a twelve-day writ, and applying *ex parte* he seldom failed to get leave (and of right, if he paid into Court). The plaintiff had then either to take dilatory proceedings

to rescind the order, or wait till the shadowy defence, on which leave had been *ex parte* obtained, collapsed upon the pleadings or particulars, or interrogatories, or could be brought to the test of a trial. Under Order XIV., on the other hand, the plaintiff had to bring the defendant before the master to show cause before final judgment could be entered; but the time for appearance was only eight days, and if the defendant appeared the summons was returnable in two (now four) clear days, and thus the plaintiff not only had the advantage of being heard against the leave to defend, but, if successful, might get his order for judgment in ten days from the issue of the writ.

In revising the procedure and issuing new rules in 1883, it was deemed undesirable to retain both these concurrent modes of summarily proceeding on bills of exchange in the High Court. Accordingly, Ord. II. r. 6, of 1883, abolishes in the High Court proceedings under the Bills of Exchange Act. And by the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 49, s. 3), that act is repealed. Sect. 7, however, provides that when that act has been applied by Order in Council to inferior Courts, it shall continue in force as to such Courts as if it were a private and local act. And the effect of this section, coupled with the Orders in Council before referred to, is to keep the Bills of Exchange Act, 1855, alive as to the County Courts for bills from 10*l.* to 50*l.* in amount.

It is optional for the plaintiff to proceed under this act: he may adopt the ordinary or a "default summons," under which,

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costs, and where, moreover, the plaintiff is satisfied (see Ord. XIV. r. 9 (b)) that there is no defence to the action, his best course is to adopt the summary procedure provided by Ord. III. rr. 6, 7, and Ord. XIV. r. 1.

Ord. III. r. 6, provides that in all actions . . . on a bill of exchange, promissory note or cheque . . . the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim. For forms of such special indorsement, see Appendix C. Sect. IV. Forms 3—6. And by r. 7, there must be added the indorsement for costs (*n*). If defendant thereupon pays, it is by the same r. 7 further provided that he may notwithstanding such payment have the costs taxed, and if more than one sixth shall be disallowed the plaintiff's solicitor shall pay the costs of taxation.

Default of
appearance.

Upon this specially indorsed writ being served, if the defendant does not, or none of the defendants do appear in eight days (*o*) (or in such other time as is limited by the order giving leave to serve the writ or notice thereof out of the jurisdiction), then the plaintiff, upon filing an affidavit of service or of notice in lieu thereof, may enter final judgment for any sum not exceeding the sum indorsed on the writ together with interest, at the rate specified (if any) or (if no rate be specified) at the rate of 5 per cent. per annum to the date of judgment, and costs.

And if there are several defendants of whom one or more appear to the writ, and another or others of them fail to appear, the plaintiff may enter final judgment as above against such as have not appeared and may issue execution upon such judgment without prejudice to his right to proceed with the action against such as have appeared (*p*). And *fi. fa.* or *elegit* to enforce payment may issue at once under Ord. XLII. r. 17.

But even if the defendant or defendants or some of the defendants appear, the plaintiff in an undefended action on

however, no leave to defend seems to be required.

In Order XIV. of the R. S. C. (1883), the period within which the summons for leave to enter final judgment is returnable, is increased from two to four days, which assimilates the period, for which (without any defence) a defendant may postpone the plaintiff's remedy, to the twelve days for appearing and obtaining

leave to defend under the Bills of Exchange Act, 1855.

As to summary procedure by default summons in the County Court, see C. C. Act, 1888, s. 86, and C. C. R. 1889, Ord. VII. rr. 29 et seq.

(*n*) R. S. C. 1883, App. A. Pt. 3, sect. 3; *Manchester Advertiser* v. *Walton*, 68 L. T., N. S. 167.

(*o*) App. A. Pt. 1, Form 2.

(*p*) Ord. XIII. rr. 2, 3, 4.

a bill is not to be subjected to all the delays of an ordinary action ; for by Ord. XIV. r. 1, where the defendant appears to a writ of summons specially indorsed under Ord. III. r. 6, the plaintiff may, on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed, and stating that in his belief there is no defence to the action, apply to a judge for liberty to enter final judgment for the amount so indorsed together with interest, if any, and costs.

This application by the plaintiff for leave to enter final judgment must be made by summons returnable not less than four clear days after service (*q*).

It was once held that the summons might be taken out without waiting for the affidavit to be sworn (*r*), but a copy of the affidavit and the exhibits referred to therein must accompany the summons when served (*s*).

Let us now see the position of the defendant upon this summary procedure.

Leave to
defend.

Upon service of the specially indorsed writ, he may, within the four days or other time mentioned in the indorsement for costs (*t*), pay the amount claimed for debt and costs, and, if he thinks the costs excessive, may have them taxed ; though if he anticipates any difficulty in recovering the balance found upon taxation to have been overpaid for costs, it would be preferable to call on the plaintiff to show cause why the proceedings should not be stayed on payment of the sum reasonably due for costs beyond the liquidated demand.

If, however, the defendant has ground for defending the action, or putting the plaintiff to proof of his claim, the defendant will appear in due course, and upon the plaintiff serving him with the summons and copy of affidavit under Ord. XIV. r. 2, he will, within the four days or longer allowed for the return of the summons, take steps for obtaining leave to defend under Ord. XIV. r. 3.

This rule provides that the defendant may show cause against such application by affidavit, or, if the judge allow it, by examination on oath, or by offering to bring into Court the sum indorsed on the writ. Such affidavit shall state whether the defence goes to the whole or to part only, and what part of the claim. And the judge may order the defendant to attend and be examined upon oath and to

(*q*) Ord. XIV. r. 2. Sunday, Christmas Day, and Good Friday not being included, Ord. LXIV. r. 2.

224 ; but this case has not been followed.

(*s*) Ord. XIV. r. 2.

(*t*) R. S. C. 1883, App. A. Pt. 3, sect. 3.

(*r*) *Begg v. Cooper*, 27 W. R.

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produce books or documents or copies of or extracts from them.

But offering to bring the money into Court is no more than a circumstance which the judge is bound to take into his consideration. It is not (as under the differently worded provisions of sect. 2 of the Bills of Exchange Act it was) decisive in the defendant's favour. The judge, therefore, will only give leave to defend when, upon the affidavits or oral examination and the production of documents, whether accompanied or not by an offer to bring the money into Court, he is satisfied that the defendant has a good defence on the merits, or thinks the facts disclosed by the defendant sufficient to entitle him to defend the action (*u*).

And here it must be noted that, independently of a good defence on the merits, there may be facts sufficient to entitle the defendant to the leave to defend.

Thus, in *Lloyd's Banking Co. v. Ogle*, Bramwell, B., laid down as a general rule that where, under Keating's Act (*x*), a defendant, applying for leave to defend in an action on a bill of exchange, on which he is sued as guarantor, would have been admitted to defend, he ought so to be admitted under Ord. XIV. r. 1, and that he would have been so admitted where, being a surety, there had been no acknowledgment by him of the debt or anything else to show that his object in defending is merely delay. In other words leave should be given if the defendant might reasonably say, "I do not know if your case is well founded or not, but I require you to prove it" (*y*).

In *Wallingford v. The Mutual Society* (*z*), the nature of the transactions disclosed on the affidavits at chambers showed that complete justice could not be done without an account; and leave to defend, except on *onerous* terms, was held to have been wrongly refused. So a counter-claim may (*a*), and a set-off it seems will (*b*), afford sufficient ground for leave to defend.

An affidavit in reply may be allowed (*c*).

(*u*) *Crump v. Carendish*, L. R., 5 Ex. D. at p. 214.

(*x*) See *Agra Bank v. Leighton*, L. R., 2 Ex. 56.

(*y*) 1 Ex. D. 262, at p. 264.

(*z*) 50 L. J., Q. B. 49; L. R., 5 App. Ca. 685. See also *Fuller v. Alexander*, 47 L. T., N. S. 443, as to when an acceptor is entitled to unconditional leave.

(*a*) *Anglo-Italian Bank v. Davies*, 38 L. T. 197. Where a

trade bill has been given and received as cash, the Court is reluctant to allow payment at maturity, to be postponed pending trial of a counter-claim. See Ann. Prac. Ord. XIV. r. 6, notes.

(*b*) *Groome v. Rathbone*, 41 L. T. 591. But cf. *Hoby v. Birch*, 62 L. T. 404.

(*c*) *Rotherham v. Priest*, 49 L. J., C. P. 104.

The Judicature Act, 1894, s. 1 (3), allows no appeal (*d*) when unconditional leave has been given.

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Where the plaintiff desires to couple with his claim on the bill and other liquidated demands other matters not admissible in the special indorsement, or where to his bill or other liquidated demand coupled therewith he knows that a *bonâ fide* and substantial defence will be raised, he should commence his action with an ordinary writ.

ORDINARY
PROCEDURE.

And if he does so, or if, on an attempt to obtain judgment under Ord. XIV., leave to defend is obtained, the steps to be taken will be those of an ordinary action, subject to the discretion of the judge. Ord. XIV. r. 8 (a).

So far as the claim in the action relates to the bill the following observations apply. CLAIM.

If plaintiff sues or defendant is sued in a representative capacity, this must appear by indorsement on the writ (*e*), whether special or ordinary.

Where the writ has been specially indorsed no other claim is to be delivered (*f*).

Where a specially indorsed writ is not resorted to an ordinary writ is issued bearing a general indorsement (*g*) of the nature of the claim, and if liquidated demands only are claimed, the indorsement for costs required by Ord III. r. 7.

If the defendant or all the defendants fail to appear, the plaintiff may enter final judgment (*h*); or if one or more appear, and others fail to appear, the plaintiff may sign final judgment against those who have not appeared, and issue execution against them without prejudice to his right to proceed against such as have appeared (*i*).

Where other than liquidated demands have been joined with the claim on the bill, the plaintiff may, on filing an affidavit of service and a statement of claim, be entitled to proceed as if the defendant or defendants had appeared (*k*).

The necessity for any pleadings at all seems entirely within the discretion of the Court.

Statement of
claim.

By Ord. XXX. since 1897 the plaintiff must in all actions

(*d*) But see *Dombey v. Playfair*, [1897] 1 Q. B. 368, where a technical defect (the ground of the leave) was amended.

(*e*) Ord. III. r. 4; Forms, App. A., Part 3, sect. 7.

(*f*) Ord. XX. r. 1.

B.B.E.

(*g*) Ord. III. r. 3; Forms, App. A., Part 3, sect. 2.

(*h*) Ord. XIII. r. 3.

(*i*) Ibid. r. 4.

(*k*) Ibid. r. 12. In this case only a statement of claim seems to be a matter of course.

CHAPTER
XXVI.Summons for
directions.

(Admiralty and proceedings under an originating summons excepted), unless the writ propose to dispense with pleadings, take out a "summons for directions" as to pleading within 14 days after the defendant (or one of several) has appeared, before taking any fresh step other than

- an application for an injunction ;
- an application to appoint a receiver ;
- an application for summary judgment under Ord. XIV. (in which case, if leave be given to defend, the judge or Master may give directions; failing which a summons seems still necessary) ;
- an application to enter judgment in default of defence (when the ten days have elapsed, Ord. XXVII. (2)).

If the plaintiff do not do so, the defendant may apply to dismiss the action, and the judge may deal with that application as justice may require, or treat it as a summons for directions, Ord. XXX. r. 8.

If the writ propose to dispense with pleadings, the defendant's application for a statement, Ord. XVIII. A., r. 3, may be treated by the judge as a summons for directions, Ord. XXX. r. 1 (e).

By rule 2 the Court or judge shall make such order as shall be just as to interlocutory proceedings, pleadings, particulars, admissions, discovery, interrogatories, inspection, commissions, examinations of witnesses, place and mode of trial. Such order shall be in the Form 4 A., Appendix K., varied as required.

So far as the claim is on the bill the short forms of Appendix C., sect. 4, are imperative (*l*).

Statement of
excuse for
omitting to
present for
payment or
acceptance,
or to give
notice of dis-
honour.

It was formerly considered doubtful (*m*) whether such facts as dispense with presentment, protest or notice of dishonour, could, or could not, be given in evidence in support of the common allegations of presentment, protest or notice in the declaration. It is now, however, clear that facts dispensing with presentment or notice, such as absence of effects in the drawee's hands, or a countermand of payment by the drawer, must be specially alleged ; and that proof of those facts is inadequate to the support of a positive averment of presentment, protest or notice (*n*). A

(*l*) Ord. XIX. r. 5. *Walker v. Hicks*, 3 Q. B. D. 8.

(*m*) *Chry v. Scott*, 3 B. & Ald. 619 ; Bayley on Bills, 5th ed. 406.

(*n*) R. S. C. 1883, App. C.,

Sect. IV., forms 5 and 6. *Burgh v. Legge*, 5 M. & W. 418. See *Terry v. Parker*, 6 Ad. & E. 502 ; 1 N. & P. 752, S. C. ; *Carter v. Floucer*, 16 M. & W. 749 ; *Wirth*

promise to pay, however, may be admissible under the common averments as *prima facie* evidence that the preliminaries essential to the maintenance of the action, such as presentment and notice, have been satisfied (*o*). But if it should distinctly appear in evidence that there has been a neglect to present, and that the defendant, being aware of the omission, afterwards promised to pay, so that the promise is used as a waiver, it is conceived that that fact must be specially alleged. It may be otherwise, where there has been a neglect to give notice of dishonour in due time, and a promise to pay, with notice of the omission, has been afterwards made before action brought, for then the defendant has, in the words of the allegation, had notice of the dishonour, which notice, under the circumstances, may be deemed as against him due notice. But the law on this subject did not appear to be very clearly settled (*p*). It seems, however, that notice, too late in the usual course, but reasonable and sufficient under the special circumstances, may be proved under the ordinary allegation (*q*).

It is not necessary to allege a notice to the defendant of the indorsement on a bill or note, and if the declaration contained such a statement, it was not traversable (*r*).

Statement of
notice of in-
dorsement.

v. Austin, L. R., 10 C. P. 689. But the power of amendment in such cases is liberally exercised. *Cordery v. Colville*, 32 L. J., C. P. 210; 14 C. B., N. S. 724. In an action against the drawer of a cheque, the special indorsement must allege notice of dishonour, or the facts excusing it, *Fruhauf v. Grosvenor*, 61 L. J., Q. B. 717; though the affidavit need not, *May v. Chidley*, [1894] 1 Q. B. 451; the special indorsement may be amended once without leave, *Roberts v. Plant*, [1895] 1 Q. B. 597. Is amendment now a "fresh step"? See Stringer on Summons for Directions, p. 104. So too a summons under the Bills of Exchange Act, 1855, in the County Court, Vid. Annual C. C. Prac. 1899, p. 487.

(*o*) See *Hopley v. Dufresne*, 15 East, 275; 13 R. R. 463; *Lundie v. Robertson*, 7 East, 231; 3 Smith, 225; *Hicks v. Duke of Beaufort*, 4 Bing. N. C. 229; 5 Scott, 593;

Metcalf v. Richardson, 11 C. B. 1011. See the Chapter on PRESENTMENT FOR PAYMENT.

(*p*) See *Brownell v. Bonney*, 1 Q. B. 39; 3 M. & Ry. 359; Dans. & L. 151; *Firth v. Thrush*, 8 B. & C. 387; 32 R. R. 421; *Baldwin v. Richardson*, 1 B. & C. 245; 2 D. & Ry. 285; 25 R. R. 883. See *Kilby v. Rochussen*, 18 C. B. 357, where a subsequent promise to pay was held to be good either as a waiver of notice of dishonour or as evidence of due notice having been received. The Code fully recognizes an implied waiver of presentment, s. 46 (2), e, and of notice of dishonour, s. 50 (2), b; these apparently must be specially alleged.

(*q*) *Carter v. Flower*, 16 M. & W. 749.

(*r*) *Bradbury v. Emans*, 5 M. & W. 595; 7 Dowl. 849; *Reynolds v. Davies*, 1 B. & P. 625.

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controversy (*g*). Bearing these principles in mind, cases decided prior to the new system of pleading may still, in many instances, be referred to with advantage.

Particulars
when
required.

Where a defendant relies on fraud, misrepresentation, &c., he must specially plead the facts, or deliver particulars in or with his pleading, adding an allegation that the plaintiff took without value, with notice, or overdue, as the case may be (*h*).

When the plaintiff's title is to be impeached by notice of fraud that notice must be alleged as a fact, though it is not necessary to set out the evidence (*i*).

Absence of
consideration.

A defence of absence of consideration must state that the bill was an accommodation bill, or otherwise specify the circumstances in which it was given (*k*). A plea simply averring absence of consideration was improper. It had to state affirmatively the circumstances relating to the consideration (*l*); and distinctly deny that there was any consideration other than that alleged (*m*). But it was good after verdict (*n*). If the informal plea of no consideration were traversed, the affirmative still lay on the defendant as it would have done had he pleaded properly (*o*). Where the defendant pleaded that there was no consideration, and issue was taken thereon, it was held that the defendant was at liberty to show that the contract, which would otherwise have constituted the consideration, was avoided by fraud (*p*). If a plea stated the circumstances under which the bill or note was given, and added that there was no consideration,

(*g*) Ord. XXVIII.

(*h*) Ord. XIX. r. 6; App. D., sect. 4. Formerly stating the facts was held bad as amounting to an argumentative denial of the acceptance. *Toms v. Corbett*, 11 L. J., Q. B. 181. See ante, p. 56.

(*i*) Ord. XIX. rr. 22 and 23. *Uther v. Rich*, 2 P. & D. 579. A plea that defendant's agent fraudulently disposed of the bill, of which fact the plaintiff had notice, was held bad for not denying the receipt of value by the defendant. *Noel v. Rich*, 2 C., M. & R. 360.

(*k*) R. S. C. App. D., sect. 4. Forms 9, 10, 11, 12.

(*l*) *Easton v. Pratchett*, 1 C., M. & R. 798; 3 Dowl. 472; 1 Gale, 33; *Stoughton v. Earl of*

Kilmorey, 2 C., M. & R. 72; 3 Dowl. 705; 1 Gale, 91; *Graham v. Pitman*, 5 Nev. & Man. 37; 3 Ad. & Ell. 521; *Trinder v. Smedley*, 3 Ad. & E. 522; 5 N. & M. 138.

(*m*) *Boden v. Wright*, 12 C. B. 445.

(*n*) *Easton v. Pratchett*, in error, 2 C., M. & R. 542; and see *Kemble v. Mills*, 1 M. & Gr. 757; 5 Scott, 121; *Crofts v. Beale*, 11 C. B. 172.

(*o*) *Lacey v. Forrester*, 2 C., M. & R. 59; 3 Dowl. 668; 1 Gale, 139.

(*p*) *Mills v. Oddy*, 2 C., M. & R. 103; 3 Dowl. 722; 6 C. & P. 728; *Southall v. Rigg*, 11 C. B. 481; *Forman v. Wright*, *ibid*.

a traverse of the first averment was sufficient, without a traverse of the last (*q*).

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Formerly payment might, in the action of assumpsit, have been given in evidence in reduction of damages. But not in an action of debt (*r*). It must now in all cases be pleaded (*s*), although the payment be of interest only (*t*). If the plaintiff in his declaration gave credit for part payment, the allegation of part payment was not traversable (*u*). A plea of payment must be supported by proof of actual payment in money (*x*); but where a bill has been given in satisfaction of another bill and ultimately paid, in an action on the first bill it will be sufficient to plead such payment (*y*).

Payment.

Where a plea alleges the satisfaction of the instrument sued on by the giving of another, it must state that the substituted instrument was given as well as taken in satisfaction (*z*). Both of which allegations might have been involved by the plaintiff in one traverse (*a*); but now a specific denial would be proper.

Satisfaction.

A tender after the bill became due is no defence by the acceptor (*b*). But a drawer or indorser may perhaps tender within a reasonable time after dishonour (*c*). A tender should be unconditional; the party making it cannot require a receipt as a condition precedent, without invalidating the tender. But if the tender be objected to by the creditor on other grounds, the requisition of a receipt becomes immaterial (*d*).

Tender.

After pleading over, every ambiguous pleading must have had such an interpretation as would make it good rather

Effect of
pleading over.

(*q*) *Atkinson v. Davies*, 11 M. & W. 236.

(*r*) *Cooper v. Morecraft*, 3 M. & W. 500; 6 Dowl. 562.

(*s*) Ord. XIX. rr. 15 and 19.

(*t*) *Adams v. Palk*, 3 Q. B. 2.

(*u*) *Hodgins v. Hancock*, 14 M. & W. 120. See other points relating to a plea of payment in the Chapter on PAYMENT. As to the proper mode of pleading payment into Court in an action on a bill, see *Tattersall v. Parkinson*, 16 L. J., Exch. 196; 4 D. & L. 522; 16 M. & W. 752.

(*x*) *Morley v. Culterwell*, 7 M. & W. 174.

(*y*) *Thorne v. Smith*, 10 C. B. 659.

(*z*) *Crisp v. Griffiths*, 2 C., M. & R. 159; 3 Dowl. 752; 1 Gale, 106.

(*a*) *Webb v. Weatherby*, 1 Bing. N. C. 502; 1 Scott, 477; 1 Hodges, 39; and see *Bennison v. Thelwell*, 7 M. & W. 512; *Ridley v. Tindall*, 7 Ad. & E. 134.

(*b*) *Hume v. Peploe*, 8 East, 168; 9 R. R. 399; *Dobie v. Larkin*, 10 Exch. 776.

(*c*) *Walker v. Barnes*, 5 Taunt. 240; 1 Marsh. 36; 15 R. R. 655. But see *Siggers v. Lewis*, 1 C., M. & R. 370; 2 Dowl. 681.

(*d*) *Cole v. Blake*, 1 Peake, 238; 3 R. R. 381; *Richardson v. Jackson*, 8 M. & W. 298; ante, p. 307.

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than bad (*e*); for, by pleading over, the adverse party admits that he has understood it in a sense which requires an answer.

Sham or en-
snaring pleas.

Although the Court would not in general determine upon the validity of a plea in point of law, or the truth of it on motion, except in particular cases, nevertheless where a plea pleaded was beyond doubt a frivolous or sham plea, they would exercise their authority by so doing (*f*). Where in an action on a bill of exchange by the indorsee, against the acceptor, the defendant set forth in his plea a number of facts, calculated to perplex the plaintiff, the Court on an affidavit of its falsehood, no cause being shown for pleading it, set it aside (*g*).

The Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 52, gave the Court a statutable jurisdiction in these and other cases, by enacting that if any pleading were so framed as to prejudice, embarrass, or delay the fair trial of the action, the Court or a judge might strike it out or amend it.

And now, by Ord. XIX. r. 27, and XXV. r. 4, the Court or a judge may, at any stage of the proceedings, order to be struck out or amended any matter which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action.

SET-OFF AND
COUNTER-
CLAIM.

The defendant's right to set-off and counter-claim has assumed great importance under the modern system of pleading.

Though the subject is not free from confusion upon the authorities, a distinction is still preserved between matters which are the subject of set-off and counter-claim (*h*). In both, the claim must be something recoverable by action (*i*).

After inquiring therefore into the origin and subject

(*e*) *James v. Williams*, 13 M. & W. 828.

(*f*) *Horner v. Keppel*, 10 Ad. & E. 17; 2 P. & D. 234; Ord. XXV. r. 4.

(*g*) *Miley v. Walls*, 1 Dowl. 648; and see *Horner v. Keppel*, 10 Ad. & Ell. 17; 2 P. & D. 234, S. C.; *Knowles v. Burward*, 10 Ad. & Ell. 19; 2 P. & D. 235; *Balmanno v. Thompson*, 6 Bing. N. C. 153; 4 Jurist, 43; 8 Scott, 306; *Bradbury v. Emans*, 5 M. & W. 595; 7 Dowl. P. C. 849; *Emanuel v. Randall*, 8 Dowl. 238;

Midford v. Finden, 9 Dowl. 813.

(*h*) See *Newell v. Nat. Proc. Bank*, 45 L. J., C. P. 285; 1 C. P. D. 496; *Manchester and Sheffield Railway v. Brooks*, 46 L. J., Ex. 244; 2 Ex. D. 243; *Winterfield v. Bradnum*, 47 L. J., Q. B. 270; 3 Q. B. D. 326; *Ellis v. De Silva*, 6 Q. B. D. 521; 50 L. J., Q. B. 329; *Gathercole v. Smith*, 7 Q. B. D. 626, C. A.

(*i*) *Birmingham Estates Co. v. Smith*, 49 L. J., Ch. 251; 13 Ch. D. 506.

matter of set-off, we shall perhaps be justified in concluding that under the wide terms of the Judicature Acts, all other matters claimable by action may be the subject of counter-claim.

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First, then, as to Set-off.

Compensatio, in the Roman law, corresponds with set-off in the English law ; but the provisions in the civil law, for setting one demand against another, are more liberal and extensive than those in our law before the Judicature Acts, which will be considered hereafter. *Compensatio* is defined by the civilians, DEBITI ET CREDITI INTER SE CONTRIBUTIO (*k*).

Nature of
set-off.

Yet it should seem, that set-off is unknown to the common law. It is true that Lord Mansfield says (*l*), that "where the nature of the transaction consists in a variety of receipts and payments, the law allows the balance only to be the debt ;" but that is because the entries of each side of an account current are by the usage and understanding of trade mutual payments rather than mutual cross demands.

Unknown to
the common
law.

Where, indeed, parties *agree* that mutual debts shall be set off, that agreement amounts to payment. But the law itself does not apply mutual payments in extinguishment of each other (*m*).

But though the practice of set-off was unknown to courts of law before the statutes, it was recognized in courts of equity long before (*n*): and the want of it at law was found productive of great injustice. "The natural sense of mankind," says Lord Mansfield, "was first shocked at this doctrine in the case of bankrupts ; they thought it hard that a person should be bound to pay the whole that he owed to a bankrupt, and receive only a dividend of what the bankrupt owed him."

Recognized
in equity.

This defect, therefore, was supplied in the case of bankruptcy, by the statute 4 Anne, c. 17 (*o*). Afterwards, by the statutes of Geo. 2, the same equitable provision was made for the set-off of debts generally in the Courts of law,

Introduced
by statute.

(*k*) Dig. 16, 2, 1.

(*l*) *Green v. Farmer*, 1 W. Bl. 651 ; 4 Burr. 2214, S. C.

(*m*) See the American authorities, Byles on Bills, 6th American ed. p. 549.

(*n*) *In equity* if there were cross demands, one equitable and the other legal, there was set-off, if

there would have been set-off at law, had both the demands been legal. *Freeman v. Lomas*, 9 Hare, 109 ; *Cockrane v. Green*, 30 L. J., C. P. 97 ; 9 C. B., N. S. 443, S. C. ; *Wilson v. Gabriel*, 4 B. & Smith, 243.

(*o*) *Green v. Farmer*, 1 W. Bl. 651 ; 4 Burr. 2214, S. C.

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and especially after the death of one of the parties. Then the Lords' and other Acts for the Relief of Insolvent Debtors adopted the same provision.

Division of
the subject.

In examining the subject of set-off and mutual credit, in its relation to negotiable instruments, let us consider, first, the provision of the general statutes of set-off; secondly, the doctrine of the Courts of equity; and thirdly, the provisions as to set-off under the Judicature Act. A fourth branch of the subject, viz., that of set-off and mutual credit in bankruptcy, will be dealt with under a separate chapter (*p*). The fifth branch of the subject (the set-off of costs and judgments in different Courts) is, perhaps, foreign to the design of this Treatise; but it may be proper to notice, lastly, a few cases, in which a stipulation, though not properly the subject of a set-off, is yet held to be a bar to the action.

The general
Statutes of
set-off.

First, The general statutes of set-off were the 2 Geo. 2, c. 22, s. 13, and the 8 Geo. 2, c. 24, s. 4. These statutes only gave a set-off in case of mutual *debts*; that is, of ascertained money demands (*q*).

The sums to
be set-off
must be
debts.

Hence it followed that there could be no set-off unless the demand for which the action was brought, and the counter-demand sought to be set off, were both of them debts properly so called. Therefore, there could be no set-off at all to an action in form *ex delicto*, as trover, nor to an action *ex contractu*, unless brought for a liquidated sum (*r*). Therefore, also, a guarantee could not be set off (*s*).

Set-off in
equity.

Secondly, Set-off in equity.

The jurisdiction of Courts of equity in set-off did not depend on the statute law; it existed before any Act of

(*p*) Post, Chapter on BANKRUPTCY.

(*q*) Though secured by a penalty, 8 Geo. 2, c. 24, s. 5. See *Collins v. Collins*, 2 Burr. 820; *Lee v. Lester*, 7 C. B. 1008. These statutes, though apparently not repealed, are virtually superseded by the Judicature Act, 1873, s. 24, and Ord. XIX. r. 3; and in Bankruptcy by the Act of 1883, s. 38.

(*r*) In America it has been held that damages are unliquidated where there is no criterion provided by the parties, or by the

law operating on the contract, by which to ascertain the amount. But in Pennsylvania and Illinois an unliquidated cross demand, arising from a distinct contract, may be set off. This arises from the absence of a separate administration of equity. Byles on Bills, 6th American ed. p. 543.

(*s*) *Crawford v. Stirling*, 4 Esp. 207; *Morley v. Inglis*, 4 Bing. N. C. 58; 5 Scott, 314. See *Crampton v. Walker*, 30 L. J., Q. B. 19. Nor a debt barred by the Statute of Limitations. *Remington v. Stevens*, 2 Stra. 1271.

Parliament on the subject; and has, since the statutes, been exercised in cases which they will not reach (*t*).

Thus, where A. S. directed her bankers to invest a sum of money in the public funds, which they led her to believe they had done, when in fact they had not, A. S. afterwards joining her brother, J. S., in a joint and several note to the bankers for money advanced by them to J. S., and the bankers failing, Lord Eldon directed the sum due to A. S. to be set off (*u*) against the demand in a suit by the assignees against J. S.

Equity would not relieve a party who neglected to plead a set-off at law (*x*). But if the set-off were a mere equitable demand, not available at law, equity would assist (*y*).

By the Judicature Act, 1873, sect. 24, sub-sect. 3, power was given to the Court to grant to any defendant all such relief as he shall properly have claimed by his pleading, and as the Court might have granted in any suit by the defendant against the plaintiff.

Set-off and counter-claim under Judicature Act.

And by Ord. XIX. r. 3, a defendant in any action may set off or counter-claim against the plaintiff any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a judge may, on the application of the plaintiff before trial, prevent inconvenience by refusing permission to the defendant to avail himself of the set-off or counter-claim in that particular action (*z*).

The relief claimed by a defendant, or the counter-claim made by him, must be stated specifically, and when he relies upon any facts to support such set-off or counter-claim, he must, in his statement of defence, state specifically that he does so by way of set-off or counter-claim (*a*).

(*t*) Story's Equity Jurisprudence, s. 1435.

(*u*) *Ex parte Sterens*, 11 Ves. 24; and see *Ex parte Hansom*, 12 Ves. 346; 8 R. R. 335.

(*x*) *Ex parte Ross*, Buck. 127.

(*y*) *Townrow v. Benson*, 3 Mad. 203. An equitable set-off could be pleaded by way of equitable plea in an action at law. And see *Cockrane v. Green*, 9 C. B., N. S. 443; 30 L. J., C. P. 97.

(*z*) See also Ord. XXI. r. 15. The indorsee of an overdue note

is not liable to the set-off of a debt due from his indorser to the maker, *Burrough v. Moss*, 10 B. & C. 558.

Set-off is a *defence* to the action, and so may govern the costs. The debts or sums claimed must exist between the same parties and in the same rights, *Newell v. National Bank*, 1 C. P. D. 496; *Stumore v. Campbell*, [1892] 1 Q. B. 314. A set-off must be specially pleaded and the particulars given, App. D., sect. 2. Form 5.

(*a*) Ord. XXI. r. 10, and Forms,

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Where a defendant raises a counter-claim against the plaintiff along with others, he must set forth in the title of his defence the names of all such persons, and must deliver his defence to such of them as are parties to the action, within the prescribed period (*b*). Even though the original is stayed, discontinued, or dismissed, the counter-claim may be proceeded with (*c*). Should the set-off or counter-claim be established for a greater amount than that claimed by the plaintiff, the defendant may have judgment in his favour for such balance (*d*).

It will thus be seen that a defendant in an action may avail himself of any claim he may have against the plaintiff which would support a cross action, and is not confined to claims against the plaintiff solely, but may join those against the plaintiff jointly with others, provided he take the proper steps in pleading. A party named in a counter-claim cannot counter-claim against the defendant (*e*).

REPLY.

The plaintiff has twenty-one days from delivery of defence to reply (*f*), and where a counter-claim is pleaded a reply thereto is subject to the rules applicable to defence (*g*).

To plea
denying con-
sideration.

To a plea denying consideration a replication simply averring consideration was good (*h*). And even if the plaintiff in his replication set out the particular consideration, and *concluded to the country* under the old form of pleading, he was not bound to prove it (*i*).

Pleading an
estoppel.

Where a party to a bill, as an acceptor or indorser is concluded from denying a fact, as, for example, the drawing or a prior indorsement, the estoppel must be specially pleaded (*k*), as the plaintiff may not now demur.

Distributive
reply.

Where one defence is pleaded to several notes or bills, and the plaintiff makes but one reply to the defence, it

App. D., sects. 1 and 8, App. E., sect. 2.

(*b*) Ord. XXI. r. 11; *Pender v. Tuddei*, [1898] 1 Q. B. 798.

(*c*) Ibid. r. 16.

(*d*) Ibid. r. 17.

(*e*) *Street v. Gorer*, 2 Q. B. D. 499; *Alcoy v. Greenhill*, [1896] 1 Ch. 19.

(*f*) Ord. XXIII. rr. 1 and 2.

(*g*) Ibid. r. 4.

(*h*) *Prescott v. Leri*, 3 Dowl. 403; 1 Scott, 726; *Bramah v.*

Roberts, 1 Bing. N. C. 469; 1 Scott, 350; *May v. Seyler*, 3 Exch. 563. Ord. XIX. r. 25.

(*i*) *Low v. Burrows*, 2 Ad. & E. 483; 4 N. & M. 366; *Batley v. Catterall*, 1 M. & Rob. 379.

(*k*) *Sanderson v. Colman*, 4 M. & G. 209; *Armani v. Castrique*, 13 M. & W. 443. Now, perhaps, the facts should be stated showing the estoppel and the allegations to which it applies. Ord. XXV. rr. 1, 2, 3.

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would probably be construed distributively, as it would formerly have been (*l*).

Interrogatories, discovery of documents, and inspection thereof are now regulated by Ords. XXX. r. 2, and XXXI. Interrogatories, &c.

Demurrers are abolished, and points of law are to be raised on the pleadings (*m*). Demurrer abolished.

New assignments are no longer allowed, their purpose being now effected by way of reply or amended statement of claim (*n*); and Ord. XXIV. regulates pleading of matters arising pending the action. Also new assignments.

The Court will sometimes consolidate actions on bills where the parties and the question to be tried are the same (*o*). And the power so exercised is expressly continued by the new rules (*p*). MULTIPLICITY, CONSOLIDATION AND STAY.

And where many actions are pending, if the same question is involved, though the parties be not the same, a test action may be selected and tried in the first instance (*q*).

If the holder bring concurrent actions against the acceptor, the drawer and the indorsers, the Court will stay the proceedings in any one of those actions on payment of the amount of the bill and of the costs in that particular action; but they would not formerly have stayed proceedings in an action against the acceptor, except upon the terms of his paying the costs in all the other actions, he being the original defaulter (*r*). For, though no action lies against the acceptor for these costs (*s*), yet when he came to ask a favour, as a stay of proceedings, the Court might with propriety have put him under terms. Afterwards, however, by rule of all the Courts, it was ordered that in any action against the acceptor of a bill or maker of a note, the defendant may stay proceedings, on payment of debt and costs in that action only (*t*).

(*l*) *Wood v. Peyton*, 13 M. & W. 30.

(*m*) Ord. XXV. rr. 1, 2.

(*n*) Ord. XXIII. r. 6.

(*o*) *Booth v. Payne*, 11 L. J., Exch. 256; *Sharp v. Lethbridge*, 4 M. & Gr. 37.

(*p*) Ord. XLIX. r. 8. In *Martin v. Martin*, [1897] 1 Q. B. 429, the plaintiff obtained the order.

(*q*) *Amos v. Chadwick*, L. R., 9 Ch. D. 459.

(*r*) *Smith v. Woodcock*, 4 Tyr.

691; *Windham v. Wither*, 1 Str. 515; *Golding v. Grace*, 2 W. Bl. 749. See *Lewis v. Dalrymple*, 3 Dowl. P. C. 433.

(*s*) *Dawson v. Morgan*, 9 B. & C. 618.

(*t*) R. T. T. 1 Vict., and Hil. T. 16 Vict.; and see *Cornes v. Taylor*, 10 Exch. 441; and Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5). And as to saving of prior consistent procedure, Jud. Act, 1875, s. 21; Ord. LXXII. r. 2.

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If the bill or note were obtained by the plaintiff from the defendant without consideration, on an affidavit to that effect by the defendant, the Court will stay the proceedings; but, where there are contradictory affidavits, the Court will not interfere in this summary way, but put the defendant to insist on it as a defence on the trial (*u*). Where an indorsement was made on a promissory note by the plaintiff, the payee, that if the interest were paid on stipulated days during her life the note should be given up, the Court refused to stay proceedings on payment of interest and costs (*x*).

MODE OF
TRIAL.

Unless a party to the action applies for a trial with a jury of the cause, or any issue of fact, and obtains an order, the mode of trial will be by judge without a jury (*y*), subject to the power of the Court or a judge to order otherwise in cases of accounts not conveniently triable by jury (*z*), or where the cause was, without consent, otherwise triable, before 1873 (*a*).

Right to
begin.

If there is only one issue the right to begin is with the party upon whom the affirmative lies (*b*).

If there be more than one issue the plaintiff is entitled to begin if the affirmative of any one issue is upon him (*c*), even though, in certain cases, the amount of the unliquidated damages (*d*) is the only question upon which the burthen of

(*u*) *Turner v. Taylor*, Tidd's Pr. 9th ed. 530.

(*x*) *Steel v. Bradfield*, 4 Taunt. 227.

(*y*) Ord. XXXVI. rr. 6, 7.

(*z*) Ibid. r. 5.

(*a*) Ibid. r. 4.

(*b*) *Amos v. Hughes*, 1 M. & R. 464.

(*c*) *Collier v. Clarke*, 5 Q. B. 467.

(*d*) As the right to begin is sometimes also an onerous necessity (see *Edwards v. Jones*, 7 C. & P. 633), it is important to bear in mind, that under the old practice the mere fact that damages, though unliquidated, were in dispute, did not entitle the plaintiff to begin. The question was, on whom was the affirmative (or, more correctly, the *onus probandi*) on the record; and the new Rule of 1833 did not affect that practice in actions

of contract. Per Coleridge, J., in *Lewis v. Wells*, 7 C. & P. 221. The effect of that rule, as expounded by further decisions, (Ibid. 262; *Harrison v. Gould*, Ibid. 508), may be thus summarized, that in actions *ex delicto*, for injury to the person or reputation, and actions *ex contractu*, which die with the person (Ibid.); the mere fact of having to prove damages gives the plaintiff the right to begin, although on the record (*e.g.*, libel—plea, justification) the onus is on the defendant, but not where the damages are liquidated or nominal. *Bowles v. Neale*, Ibid. 262. In all other cases the mere fact of having to prove damages, whether nominal or substantial, liquidated or unliquidated, general or special, does not give the plaintiff the right to begin when the onus on the record lies on the defendant.

proof is upon him ; but it is otherwise where the damages are liquidated or nominal, and if all the issues be upon the defendant he has the right to begin (*e*).

But though an issue may be apparently affirmative, it may be substantially negative, and *vice versâ*, or there may be a presumption in favour of the side who affirms, and therefore the test is sometimes stated to be, "who would fail if no evidence were offered on either side ? "

Thus, as between drawer and acceptor, a defence by the latter that there was no consideration either from drawer or plaintiff, though in form negative, amounts to an affirmation by the defendant that the bill, on which the law presumes him liable, is an accommodation bill (*f*).

As to whether it is the substantial issue *on the pleadings* or the substantial issue according to the course to be adopted *at the trial*, which regulates the right to begin, the cases do not conclusively show (*g*).

And even if an error in this respect is committed at the trial, a new trial will not, therefore, be granted unless injustice has been done (*h*).

It was at one time held (*i*) that if the plaintiff had the right to begin, and had notice on the record or otherwise of the defence to be set up, he was bound to go at once into his whole case, original and rebutting. But Abbot, C.J. (*k*), subsequently held otherwise, and Starkie points out that the course most likely to save time is to limit his evidence

Rebutting
evidence.

See Best, *Right to Begin*, p. 42. The same learned writer favours the view that the defendant, by admitting the amount of damages, even in a case within the rule, can obtain for himself the right to begin. Ibid. 50.

(*e*) *Mercer v. Whell*, 5 Q. B. 447 ; *Chapman v. Rawson*, 8 Q. B. 673.

(*f*) *Mills v. Barber*, 1 M. & W. 425. The damages recoverable in a claim upon the bill are expressly described as liquidated in the Code (sect. 57), though the interest thereby made recoverable is rendered uncertain in amount by the provision that such interest may be withheld in whole or in part, and the rate specified in the bill is not necessarily to be allowed as damages. Ibid. sub-s. 3. But for the pur-

poses of determining the right to begin, this uncertainty would seem to be immaterial. *Cannam v. Farmer*, 3 Exch. 698.

(*g*) See *Homan v. Thompson*, 6 C. & P. 717 ; *Smart v. Rayner*, Ibid. 721 ; *Mills v. Oddy*, Ibid. 728 ; 3 Dowl. 722 ; 2 C., M. & R. 103 ; *Pontifex v. Jolly*, 9 C. & P. 202. In *Oakely v. Ooddeen*, 2 F. & F. 656, the defendant's right to begin on the pleadings substantially could not be ousted by a purposely introduced money count.

(*h*) *Cannam v. Farmer*, 3 Exch. 698 ; *Scott v. Lewis*, 7 C. & P. 347.

(*i*) *Rees v. Smith*, 2 Stark. N. P. C. 30, per Lord Ellenborough, C.J.

(*k*) 1 Stark. Evid. 382.

CHAPTER
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case.

to his *prima facie* case, and to give rebutting evidence only when it is seen how much defendant can prove (*l*).

But plaintiff must take care not to "split his case," *i.e.*, his evidence of the same kind; for if, with the general right to begin, he gives part of his rebutting evidence he may be precluded thereby from following defendant's case with the residue of his rebutting evidence (*m*).

EVIDENCE.
Declarations
at the time of
making the
instrument.
Declaration
by prior
parties.

In an action by the indorsee against the maker of a note, the declarations of the payee at the time of making it are evidence as part of the *res gestæ* (*n*).

It has been held, that declarations by the holder of a negotiable instrument, made whilst he was holder, are evidence against a plaintiff who claims under him and stands on his title (*o*), in the same manner as declarations made by a former owner of an estate respecting his own title, whilst he was in possession, are evidence against a subsequent owner (*p*).

But there is an obvious distinction between the case of an assignee of land or other property and the ordinary assignee of a negotiable instrument. The former has, in general, no title either at law or in equity, unless his assignor had, but the latter may, as we have seen, have a very good title, though his assignor had none at all. Accordingly, it has been decided that, unless the plaintiff on a bill or note stands on the title of a former holder, the declarations of such former holder are not evidence against him (*q*). But if he do stand on the title of a prior holder, as if he have taken the bill overdue or without consideration, then the declarations of that prior holder are evidence against him.

Effect of
admission
on record.

It has been held, that a jury can draw no inference from an admission on record. "The pleadings," said Alderson, B., "are not before the jury, but only the issue" (*r*). But the Court of Queen's Bench have held otherwise (*s*).

(*l*) *Penn v. Jack*, L. R., 2 Eq. 314.

(*m*) *Browne v. Murray*, R. & M. 254; 27 R. R. 748; *Sylrester v. Hall*, Ibid. 255, n.; 27 R. R. 748, n.; *Williams v. Davies*, 2 Cr. & M. 464.

(*n*) *Kent v. Lowen*, 1 Camp. 177, 180.

(*o*) *Pocock v. Billing*, 2 Bing. 269; Rv. & M. 127.

(*p*) *Woolway v. Rowe*, 1 Ad. & E. 114; 3 N. & M. 849.

(*q*) *Barrough v. White*, 4 B. & C. 325; 6 D. & Ry. 379; 2 C. & P. 8; *Beauchamp v. Parry*, 1 B. & Ad. 89; 35 R. R. 225; *Shaw v. Broom*, 4 D. & R. 731; *Smith v. De Wruit*, 1 R. & M. 212; and see *Phillips v. Cole*, 10 Ad. & E. 106; 2 P. & D. 288.

(*r*) *Edmunds v. Groves*, 2 M. & W. 642; 5 Dowl. 775.

(*s*) *Bingham v. Stanley*, 2 Q. R.

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Where there was no attesting witness, the signature to a bill might always have been proved by any person who had seen the party write, or had received letters from him, or by comparison of handwriting.

Proof of
signature.

An attesting witness must always have been called, unless dead, insane, or out of the jurisdiction (*t*). But now by the 17 & 18 Vict. c. 125, s. 26, it is not necessary to call the attesting witness, except in those cases where his attestation is essential to the validity of the instrument (*u*).

If a bill or note be signed or indorsed with a mark, such mark may be proved by a person who has seen the party so execute instruments, and can recognize some peculiarity in the mark (*x*).

Proof of
mark.

Where an acceptance is by the christian and surname of the drawer, a witness who has seen him write his surname only is competent to prove the acceptance (*y*).

Proof of
name.

An averment that the defendant made a note, "his own proper hand being thereunto subscribed," is satisfied by proof that the note was made by an agent, for those words may be rejected as surplusage (*z*).

Proof of
signature by
agent.

An agreement that certain shares are to be held as a collateral security for a bill is evidence to prove an allegation that any sum received by the holder should be satisfaction *pro tanto* (*a*).

Collateral
security.

It was at one time held, that there must be some evidence of the identity of the person whose handwriting is proved as the defendant's with the real defendant, and that mere correspondence of christian and surname is no evidence of identity (*b*). But the inconvenience of such a

Identity of
defendant.

117; see *Malpas v. Clements*, 19 L. J., Q. B. 435. In *Robins v. Maidstone*, 4 Q. B. 815, the Court of Q. B. corrected the language attributed to them in *Bingham v. Stanley*; and see *Smith v. Martin*, 9 M. & W. 304; *Fearn v. Filica*, 7 M. & G. 513.

(*t*) The attesting witness must have been called, though the attestation were on the back of the bill, *Richards v. Frankhum*, 9 C. & P. 221; and though he were blind, *Crank v. Frith*, 2 Moo. & Rob. 262.

B.B.E.

(*u*) See ante, p. 98 (*i*), as to the cases in which attestation to a bill or note was essential.

(*x*) *George v. Surrey*, M. & M. 516; 31 R. R. 755

(*y*) *Lewis v. Sapio*, M. & M. 39, overruling *Powell v. Ford*, 2 Stark. 164.

(*z*) *Booth v. Grore*, M. & M. 182; 3 C. & P. 335.

(*a*) *Malpas v. Clements*, 19 L. J., Q. B. 435.

(*b*) *Whitelock v. Musgrove*, 1 C. & M. 511; *Jones v. Jones*, 9 M. & W. 75; 11 L. J., Exch. 265;

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doctrine soon compelled the Courts to retrace their steps. "The transactions of the world," says Lord Denman, "could not go on if such an objection were to prevail. It is unfortunate that the doubt should ever have been raised, and it is best that we should sweep it away as soon as we can" (c).

It is conceived that there must be some peculiar circumstances tending to raise a question, before the plaintiff can be required to show, that the person who signed the bill or note, and whose christian and surname agree with the defendant's, is the *person who was served with the writ*, for that person is the real defendant in every action.

Evidence of consideration.

Where it is necessary to prove the consideration, and on whom the burthen of proof lies, see the Chapter on CONSIDERATION.

Production of the bill.

It is not necessary to produce the bill on the trial, unless some issue be joined which renders the production of the bill necessary (d); nor on a writ of inquiry (e); nor will statements in the plea entitle the defendant to offer evidence of it without notice to produce (f). But, if interest be sought from a period before the issuing of the writ, it may be necessary to produce the bill (g).

Effect of admission under judge's order.

An admission under a judge's order that a bill was accepted by A. for B., is an admission of A.'s authority (h).

Bill or note, evidence under the common counts.

A promissory note, as between the original parties, is evidence of money lent (i), and of an account stated when

Bell v. Gunn, 11 L. J., C. P. 57. As to identity of first indorser with drawer, see *Smith v. Money-penny*, 2 Moo. & Rob. 317.

(c) *Sewell v. Erans*, 4 Q. B. 626; *Roden v. Ryde*, *ibid.*; *Hamber v. Roberts*, 18 L. J., C. P. 250.

(d) *Shearm v. Burnard*, 10 Ad. & E. 593; 2 Per. & Dav. 565; *Read v. Gamble*, 5 N. & M. 433; 10 Ad. & E. 597, n.; but see *Fryer v. Brown*, R. & M. 145.

(e) *Lane v. Mullins*, 1 Gale & Dav. 712; 11 L. J., Q. B. 51; 2 Q. B. 254; *Davis v. Barker*, 3 C. B. 606; and the production of the bill may be rendered unnecessary by an admission of the handwriting. *Chaplin v. Lery*, 23

L. J. Exch. 117; 9 Exch. 531.

(f) *Goodered v. Armour*, 3 Q. B. 956. As to what is sufficient notice, see *Lawrence v. Clark*, 3 D. & L. 87.

(g) *Hutton v. Ward*, 15 Q. B. 26.

(h) *Wilkes v. Hopkins*, 1 C. B. 737.

(i) *Clarke v. Martin*, Lord Raym. 758; per Lord Mansfield, in *Grant v. Vaughan*, 3 Burr. 1525; Bayley, 357; *Morgan v. Jones*, 1 C. & J. 167; 35 R. R. 691; *Smith v. Kendall*, 6 T. R. 123; but see *Fesenmayer v. Adcock*, 16 M. & W. 449. Money deposited with a banker is money lent. *Pott v. Clegg*, 16 M. & W. 321.

the note falls due (*k*), and is admissible as a paper or writing to prove the defendant's receipt of so much money; and even although it has been invalidated, *as a note*, by alteration (*l*). But a bill which never was properly stamped is not thus admissible for collateral purposes, though formerly held to be so (*m*). An instrument though not stamped is admissible to show that the transaction is void, as, *e.g.*, formerly for usury (*n*). An instrument promising payment on condition, which, as we have seen, is not a promissory note, was not evidence to sustain the money counts (*o*).

Upon principle it appears clearly that a bill or note can be evidence under the money claims only as between immediate parties, and the latter decisions are in favour of this doctrine (*p*), though it has been held evidence of money received to the use of the holder (*q*).

An indorsement is *primâ facie* evidence of money lent by the indorsee to the indorser (*r*), and of an account stated (*s*).

Primâ facie all negotiable instruments, and indeed all payments, are to extinguish an existing debt, not to create a new one (*t*); *i.e.*, *primâ facie* they are repayments. Hence a cheque duly paid by the banker is no evidence by itself of money lent by the drawer to the payee, for the mere fact of money passing from A. to B. is of itself no proof of a loan from A. to B. Nor is the fact that A.'s cheque in favour of B. has been paid by the banker, and that the cheque bears B.'s indorsement. For all that appears is that A.'s money has been paid by A. to B. through a banker; but whether as a loan from A. to B., or whether as a repayment of money previously due from A. to B. on some other account, or whether because B. had cashed the cheque, does not appear. And a fact which is equally consistent with any one of three different hypotheses

What a paid cheque is evidence of as between drawer and payee.

(*k*) *Wheatley v. Williams*, 1 M. & W. 539; *Irring v. Veitch*, 3 M. & W. 90.

(*l*) *Sutton v. Toomer*, 7 B. & C. 416; 1 Man. & R. 125; *Tomkins v. Ashby*, 6 B. & C. 541; 9 Dowl. & R. 543; M. & M. 32.

(*m*) *Jardine v. Payne*, 1 B. & Ad. 663; *Jones v. Ryder*, 4 M. & W. 32; *Holmes v. Mackrill*, 3 C. B. N. S. 789.

(*n*) *Nash v. Duncomb*, 1 M. & Rob. 104.

(*o*) *Morgan v. Jones*, 1 C. & J. 162; 1 Tyrw. 21; 35 R. R. 691.

(*p*) *Wayman v. Bend*, 1 Camp.

175; *Bentley v. Northouse*, M. & M. 66; *Eales v. Dicker*, M. & M. 324; Bayley, 357, 6th ed.

(*q*) *Vide* Chitty, 9th ed. 581, and Bayley, 6th ed. p. 358; *Grant v. Vaughan*, 3 Burr. 1516.

(*r*) *Kessebower v. Tims*, Bayley, 6th ed. 357 and 359.

(*s*) *Burmester v. Hogarth*, 11 M. & W. 101; *Fryer v. Roe*, 12 C. B. 437.

(*t*) *Welch v. Seaborn*, 1 Stark. 474; *Pearce v. Daris*, 1 Mood. & Rob. 365; *Morgan v. Jones*, *supra*.

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is proof of no one of the three. The indorsement makes no difference, for that merely shows that the cheque passed through B.'s hands, and may have been added at the banker's request for the banker's better security, although had the cheque got into the hands of a subsequent holder with B.'s indorsement on it, that indorsement might then have been evidence of money lent by the holder to B. or of an account stated between them (u).

As between
banker and
customer.

As between banker and customer a cheque paid by the banker is no proof of money lent or advanced by the banker to the customer, but *primâ facie* it shows a return of money previously deposited by the customer with the banker.

Whether an
unpaid cheque
is evidence.

A cheque not presented has been held not to be evidence of money lent by the drawer to the payee (x).

Proofs in
various
actions.
Payee r.
maker or
acceptor.

In an action by the payee against the maker of a note or acceptor of a bill, the plaintiff must, if the making or acceptance be in issue, prove the handwriting (y) of the person whose name appears as the maker of the note or acceptor of the bill.

Indorsee r.
maker or
acceptor.

Unless admitted, in an action by the indorsee against a maker or acceptor, the plaintiff must first prove the making of the note or the acceptance of the bill. We have already seen that the acceptance admits the drawing. Then the indorsement must be proved, and if it be special, it must appear that the indorsee is the person described in it. If the instrument be payable to bearer or indorsed in blank, it is of course unnecessary to allege or prove (z) a subsequent indorsement.

(u) *Rogers v. Flook*, Bristol Summer Assizes, 1866.

(x) *Pearce v. Davis*, 1 M. & Rob. 365.

(y) By the Common Law Procedure Act, 1852, s. 117, either party was able to call on the other by notice to admit any document saving all just exceptions, and in case of refusal or neglect to admit, the costs of proving the document should be paid by the party neglecting or refusing, unless at the trial the Judge should certify that the refusal to admit was reasonable; and no costs of proving any document should be allowed unless such notice should be given,

except in cases where the omission to give the notice was in the opinion of the Master a saving of expense. And see R. 30, H. T. 1853. Similar provisions as to admissions of documents exist under the new Ord. XXXII. r. 2, and as to admissions of facts under Id. r. 4. By Ord. XXI. r. 9, in case of a frivolous or wanton denial or non-admission of fact in the defence, the Court may make such order as may seem just with regard to the extra costs occasioned thereby.

(z) Unless averred in the statement of claim. See Chapter on TRANSFER.

British Linen Co. v. Cowan
8 F. 704.

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A promise to pay, or an offer to renew a bill or note, made to the indorsee after it is due, is an admission of the holder's title, and will make the proof of indorsement unnecessary (*a*). But the admission of an indorser is evidence against him only, not against other parties (*b*).

In an action by an indorsee against an indorser, it is necessary, first, to prove the indorser's signature, which admits the ability and signature of every antecedent party (*c*); then a due presentment (*d*) for payment or acceptance, and dishonour; and, lastly, notice of dishonour, or, if the record admit of such proof, a competent excuse for neglecting to give it.

Indorsee v.
indorser.

An indorsement was evidence, in this action, under the common counts (*e*).

A general receipt on the back of a bill is not of itself evidence of the payment by the drawer, though he produces the bill (*f*), for "*prima facie*," says Lord Kenyon, "the receipt on the back imports that it was paid by the acceptor." But this doctrine must be taken with the qualification that slight circumstances will show the contrary (*g*).

Receipt.

Parol evidence is admissible to explain the receipt (*h*).

An entry or statement by a person since deceased against his own pecuniary interest, whenever made, is evidence between third persons of the fact which it records (*i*).

Statements
by deceased
persons.

And a minute in writing by a person since deceased, made in the ordinary course of his business, and contemporaneous with the fact it records, is also evidence (*k*).

The mode of giving facts in evidence, in the majority of cases, is practically unaltered under the Judicature Acts

Mode of proof
at trial.

(*a*) *Hankey v. Wilson*, Sayer, 223; *Bosanquet v. Anderson*, 6 Esp. 43; *Sidford v. Chambers*, 1 Stark. 326; *Jones v. Morgan*, 2 Camp. 474.

(*b*) *Hemings v. Robinson*, Barnes, 436.

(*c*) Code, s. 55 (2). *Critchlow v. Parry*, 2 Camp. 182; *Chaters v. Bell*, 4 Esp. 210; *Macgregor v. Rhodes*, 25 L. J., Q. B. 318; 6 E. & B. 266, S. C.

(*d*) *I.e.*, if denied by defence.

(*e*) *Kessebower v. Tims*, Bayley, 6th ed. 357; and see ante, p. 435.

(*f*) *Scholey v. Walsby*, 1 Peake, N. P. C. 34.

(*g*) See *Phillips v. Warren*, 14 M. & W. 379.

(*h*) *Graves v. Key*, 3 B. & Ad. 313.

(*i*) *Higham v. Ridgway*, 10 East, 109; 10 R. R. 235. See the notes to this case in 2 Smith's Lead Ca. 10th ed. 317. But as to memoranda on the bill or note itself, see the Chapter on the STATUTE OF LIMITATIONS, p. 371.

(*k*) *Price v. Earl of Torrington*, 1 Salk. 285. See the notes to 2 Smith's Lead. Ca. 310; and *Eastern Union Railway Company v. Symonds*, 5 Exch. 237.

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and Orders (*l*). But it is to be noticed that now, in the absence of written consent by the solicitors to all parties, or an order of the Court or a judge, the evidence of witnesses in all actions, whether tried in the Chancery or Common Law division, is to be *vivâ voce* and in open Court. But when the solicitors of all the parties have so consented, or a judge has made an order to that effect, any particular fact or facts may be proved by affidavit (*m*).

Bankers'
Book Evi-
dence Act,
1879 and 1882.

By virtue of a recent statute (*n*) entries in bankers' (*o*) books may be proved by examined copies, provided that it be first proved, by a partner or officer of the bank, that the book was one of the ordinary books of the bank, that the entry was made in the ordinary course of business, and that the book is in the custody of the bank. These facts, as well as the examination and correctness of the copy, may be proved either orally or by affidavit, and the copy then becomes *primâ facie* evidence of the entry and of the matters it records.

DAMAGES.

We shall shortly see that, independently of the Code, unless interest were payable by the express words of the instrument, it was in the discretion of the jury to give or withhold it, or to reduce it below 5 per cent., which is the usual rate given. So where the interest on a foreign bill is governed by the law of a foreign country, in which the rate of interest is high, the jury may give a much higher rate (*p*).

And now the Code expressly enacts (*q*), as the measure of damages on dishonour of a bill—

(a) The amount of the bill ; (b) Interest (from the time of presentment for payment if the bill is payable on demand, or from maturity in any other case) ; (c) Expenses of noting (*r*) or (when protest is necessary and has been extended) of protest.

(*l*) Jud. Acts, 1875, s. 20 ; 1894, s. 3 ; Ord. XXX. r. 7.

(*m*) Ord. XXXVII. r. 1 ; Ord. XXXVIII. Pt. 3.

(*n*) 42 & 43 Vict. c. 11, which applies to all parties, whether customers or not. *Harding v. Williams*, L. R., 14 Ch. D. 197.

(*o*) "Bank" and "banker" are defined by sect. 9 of the Act, and further by 45 & 46 Vict. c. 72, s. 11 (2). As to Post Office Savings Banks, see 56 & 57 Vict. c. 69, s. 6.

(*p*) See ante, FOREIGN LAW. Banker's commission and brokerage are not recoverable, *Banque de Bienne v. Care*, 1 Com. Cas. 67.

(*q*) Sect. 57. These damages are to be deemed liquidated, the importance of which provision in proceedings under Ord. XIV. has been pointed out ante, p. 413, and its bearing on the right to begin, ante, p. 430 (d).

(*r*) So under Bills of Exchange Act, 1855, s. 5. In *Ex parte*

Or in case of a bill dishonoured abroad in lieu of the above damages (a) re-exchange ; (b) interest thereon till payment.

Interest, where not made payable on the face of the instrument (s), is in the nature of damages for the retention of the principal debt.

INTEREST.
Its nature.

The general rule of the common law is, that interest is not recoverable unless there were an express stipulation (t), that interest should be paid, or unless such be the usage of trade. Bills and notes, by the usage of trade, carry interest from the time of maturity ; but a jury are not bound, unless they see fit, to give more than nominal interest, or, indeed, any interest at all (u).

And by statute (x), interest is recoverable on all debts payable by virtue of a written instrument, at a certain time, or ascertainable, and on all other debts after a *written* demand, and notice that interest will be claimed from the date of the demand ; but it is discretionary with the jury to give or withhold it.

And the Code (y) makes interest part of the measure of damages on dishonour of a bill. And though it provides

Under the
Code.

Brazil Bank, [1893] 2 Ch. 438, it was held that the drawer could prove against the acceptor for expenses of protest for non-payment under ss. 51 (2) and 57 (1), but not of protest for better security nor for commission. Protest in s. 68 (6) means protest for non-payment, *Ibid.* By s. 57 the expenses of noting are liquidated damages, and were held to be recoverable under an item in a specially indorsed writ for "Bank Charges," *Dando v. Boden*, [1893] 1 Q. B. 318.

(s) But if interest be payable by the terms of the instrument, it is recoverable, not as damages but as a debt. *Watkins v. Morgan*, 6 C. & P. 661 ; *Hudson v. Foxsett*, 13 L. J., C. P. 141 ; 7 M. & G. 328. So if there be a collateral agreement to pay a particular rate of interest. *Florence v. Jennings*, 26 L. J. 275 ; 1 C. B., N. S. 584. As to payment of principal, in full of both principal and interest, see PAYMENT.

(t) If at the time of a contract of sale, the vendee agrees to pay

by bill or note, and neglects to do so, interest is recoverable as part of the price. *Marshall v. Poole*, 13 East, 98 ; 12 R. R. 310 ; *Davis v. Smythe*, 8 M. & W. 399.

(u) *Keene v. Keene*, 27 L. J., C. P. 88 ; 3 C. B., N. S. 144. See *Cameron v. Smith*, 2 B. & Ald. 305 ; 5 Taunt. 626 ; 20 R. R. 444 ; *In re Burgess*, 2 Moore, 745 ; *Ex parte Williams*, 1 Rose, 399 ; *Ex parte Cocks*, *Ibid.* 317 ; *Lowndes v. Collins*, 17 Ves. 27 ; *Lithgow v. Lyan*, 1 Coop. C. C. 29. See post, p. 433.

(x) 3 & 4 Will. 4, c. 42, ss. 28, 29. See *Taylor v. Stott*, 34 L. J., Exch. 1 ; and *Duncombe v. Brighton Club*, L. R. 10 Q. B. 371.

(y) Sect. 57. A claim for interest till payment or judgment and expenses of noting is for a liquidated sum within Ord. III. r. 6, *Lawrence v. Willcocks*, [1892] 1 Q. B. 696 ; *London U. Bank v. Clancarty*, [1892] *Ibid.* 689, though the rate be not stated, *Blood v. Robinson*, 36 Solicitors' Journ. 203. If the rate be abnormal, a special agreement

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that such damages "shall be deemed to be liquidated damages," it preserves the discretion above mentioned in the jury by further enacting (z) that "such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest or damages may or may not be given at the same rate as interest proper."

From what time it runs when payable by the terms of the instrument.

Interest is seldom expressly made payable on the face of the instrument, but sometimes it is so.

Before the Code, where interest was expressly made payable on the face of the instrument, it carried interest from its date, and not merely from its maturity. For it was said unless the words "bearing interest," or other words of similar import, are taken to mean that interest is payable from the date of the instrument, they would be idle, since without any such words the owner of the bill or note would be entitled to interest from its maturity. Thus it has been held, that on a bill drawn payable at a certain period after date, *bearing interest*, the plaintiff is entitled to recover interest from the date of the bill (a). So where a note was made payable on demand with lawful interest, it was held to carry interest from the date (b). So a promissory note, whereby the maker promised to pay, one year after his death, 300*l.* with legal interest, bears interest from the date of the note (c).

From what time it runs when not made payable by the terms of the instrument.

But it should be noted that the Code, s. 57, now makes the interest recoverable from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill *in any other case*. If this provision does not reach the case of interest expressed to be payable on the face of the bill, it merely declares the law, as previously established, so far as other cases are concerned. For it has long been the rule that where interest is not expressly made

to that effect must be alleged, *Elliott v. Roberts*, 36 Solicitors' Journ. 92; *vide* also *Parker v. Brand*, 7 T. L. R. 462. In *Reilly v. Master*, [1892] 1 Q. B. 674, the parties were not suing on the bill under sect. 57, but on the implied contract to indemnify an accommodating party. In *Clancarty's case*, Smith, L.J., held that interest, even if stipulated at a particular rate, was within the discretion of the Court.

(z) Coch. s. 57, b (3); 3 & 4 Will. 4, c. 42.

(a) *Kennerly v. Nash*, 1 Stark. 452; *Doman v. Dibden*, 1 R. & M. 381; 27 R. R. 761; *Richards v. Richards*, 2 B. & Ad. 447; 36 R. R. 619. Or from date of issue, Code, s. 9 (3).

(b) *Weston v. Tomlinson*, Chitty, 9th ed. 681; *Hopper v. Richmond*, 1 Stark. 507.

(c) *Roffey v. Greenwell*, 10 Ad. & E. 222; 2 Per. & Dav. 365.

payable by the terms of the instrument, it runs from the maturity of the bill or note. If the bill or note, not expressly made payable with interest, be payable on demand, interest runs, not from the date of the instrument, but from the time of the demand (*d*).

Where there has been no demand except the action interest may be given from the service of the writ of summons (*e*).

The indorser of a bill or note has been held liable to pay interest only from the time that he receives notice of the dishonour. "The drawer cannot," says Mansfield, C.J., "find out by inspiration who is the holder, and till he finds that out he cannot pay the bill. When he has found out who is the holder, he is bound to pay the bill within a reasonable time. If he does not he is liable to damages for not performing his contract: those damages are the interest on the bill" (*f*).

As against an indorser.

Interest was formerly computed only to the commencement of the suit, but it is now carried down to final judgment. "That," says Lord Mansfield, "does the plaintiff complete justice. It is agreeable to the principles of the common law, and interferes with no statute. It takes from the defendant the temptations to make use of all the unjust dilatories of chicanery. For, if interest is to stop at the commencement of a suit, where the sum is large, the defendant may gain by protracting the cause in the most expensive and vexatious manner, and the more the plaintiff is injured, the less he will be relieved" (*g*). Judgments now under Ord. XLII. r. 16, carry interest at four per cent.

To what period it is computed.

Where money is paid into Court on a security carrying interest, interest must be paid, not merely to the commencement of the action, but to the time of payment into

When money is paid into Court.

(*d*) *Blaney v. Hendricks*, 2 Bla. 761; *Cotton v. Horsemanden*, Prac. Reg. 357; and see *Barough v. White*, 4 B. & C. 327; 6 D. & Ry. 379; 2 C. & P. 8; *Parker v. Hutchinson*, 3 Ves. 134; *King v. Taylor*, 5 Ves. 808; 5 R. R. 172; *Lithgow v. Lyan*, 1 Coop. 29; *Lowndes v. Collins*, 17 Ves. 27.

(*e*) *Pierce v. Fothergill*, 2 Bing. N. C. 167; 2 Scott, 334.

(*f*) *Walker v. Barnes*, 5 Taunt.

240; 1 Marsh. 36; 15 R. R. 655. But sect. 57 seems to apply now equally to an indorser.

It is held in America that it is error to calculate interest on the damages allowed on a protested bill of exchange from the maturity of the bill. See 6th American edition of Byles on Bills, p. 465.

(*g*) *Robinson v. Bland*, 2 Burr. 1077; *Clancarty's case*, supra.

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Court (*h*), or the plaintiff may proceed in the action for the difference (*i*).

In trover.

But in trover the rule formerly was that the plaintiff is entitled to damages equal to the value of the article converted *at the time of the conversion*. And, therefore, in trover for bills or notes, interest was only calculated down to the time of conversion. But by the 3 & 4 Will. 4, c. 42, the jury might give damages over and above the value of the goods at the time of the conversion.

After tender.

Interest ceases to run after a tender. Lord Ellenborough : "I think interest ought to stop from the offer to pay" (*k*).

How bankers should charge it on cheques.

A banker in charging interest to a customer, who has overdrawn his account, should compute it, not from the date, but from the payment of the customer's cheques (*l*).

Recovery of interest after receipt of the principal.

Though the principal have been paid, yet the plaintiff may proceed for interest, unless it have been incurred by the negligence of the plaintiff (*m*). So where for the amount of the principal on an overdue bill another bill was given, and afterwards paid, it was held that an action lay on the original bill for the interest (*n*).

When interest not recoverable.

We have already observed, that where interest is not payable by the terms of the instrument, it is in the nature of damages. Hence it has been held, that the owner of a bill is not necessarily and invariably entitled to interest, but that a jury are justified in reducing or withholding it altogether (*o*).

When an engagement to give a bill will create a liability to interest.

An engagement to give a bill will create a liability to interest on a contract, which would not otherwise carry it. Thus, where goods are sold to be paid for by a bill which is not given, interest is recoverable as part of the price of

(*h*) *Mercer v. Jones*, 3 Camp. 477.

(*i*) *Kidd v. Walker*, 2 B. & Ad. 705.

(*k*) *Dent v. Dunn*, 3 Camp. 296; 13 R. R. 809.

(*l*) *Goodbody v. Foster*, Cambridge Summer Assize, 1831, Lyndhurst, C. B.

(*m*) *Laing v. Stone*, M. & M.

229, n. ; 2 M. & Ry. 561.

(*n*) *Lumley v. Musgrave*, 4 Bing. N. C. 9 ; 5 Scott, 230 ; but see the Chapter on PAYMENT.

(*o*) *Cameron v. Smith*, 2 B. & Ald. 308 ; 20 R. R. 444 ; *Du Belloix v. Lord Waterpark*, 1 D. & R. 16 ; 24 R. R. 628 ; and see *Dent v. Dunn*, 3 Camp. 296 ; 13 R. R. 809 ; Code, s. 57 (3).

the goods, and it has been held that this interest may be recovered in an action for goods sold and delivered (*p*).

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A party who guarantees the due payment of a bill is liable for interest (*q*).

Liability of a guarantor for interest.

Where the action goes on to trial, the jury assess the interest; the plaintiff's counsel usually stating the sum which is claimed. Where judgment went by default in debt, the plaintiff indorsed on the writ of execution more than the exact sum due at his peril. In actions of assumpsit the Courts had *the power* of assessing the damages, but in order to inform the conscience of the Courts they usually issued a writ of inquiry. In actions on bills and notes, however, the amount of damages being mere matter of calculation, the writ of inquiry was formerly supplied by a reference to the master to compute principal and interest, and latterly by the special indorsement, which rendered it unnecessary (*r*).

How interest is recovered.

The rate of interest usually allowed is five per cent., but we have seen that the jury may reduce the rate, or they may increase it. Thus, where a bill carries ten per cent. interest from its date, a jury may give the same rate of interest from its maturity to judgment (*s*).

The rate of interest.

The common indebitatus count for interest was good (*t*).

Indebitatus count.

Formerly, to contract for more or to take more than five per cent. interest on any transaction relating to bills or notes was usurious and illegal. Various statutes, however (*u*), exempted a large proportion of bills and notes from the operation of the usury laws, and at length repealed the usury laws altogether.

Usury laws.

Re-exchange is the difference in the value of a bill, occasioned by its being dishonoured in a foreign country in which it was payable. The existence and amount of it depend on the rate of exchange between the two countries.

RE-
EXCHANGE.

(*p*) *Marshall v. Poole*, 13 East, 98; 12 R. R. 310; *Farr v. Wurd*, 3 M. & W. 26; 6 Dowl. 163.

(*q*) *Ackerman v. Ehrensperger*, 16 M. & W. 99. And can prove for it in bankruptcy, *Ex parte Davis*, 66 L. J., Q. B. 499; 76 L. T., N. S. 530.

(*r*) See the Common Law Procedure Act, 1852, s. 94, and 18 & 19 Vict. c. 67, and now Code, s. 57,

and Ord. III. r. 6, Ord. XIV. r. 1.

(*s*) *Keene v. Keene*, 27 L. J., C. P. 89; 3 C. B., N. S. 144; but *quære*, as to effect of Code, s. 57 (1) b, on the power to reckon "from its date" in such cases.

(*t*) *Nordenstrom v. Pitt*, 13 M. & W. 723.

(*u*) 3 & 4 Will. 4, c. 98, s. 7; 1 Vict. c. 80; 2 & 3 Vict. c. 37; and 17 & 18 Vict. c. 90.

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The theory of the transaction is this: A merchant in London indorses a bill for a certain number of Austrian florins, payable at a future date in Vienna. The holder is entitled to receive in Vienna, on the day of the maturity of the bill, a certain number of Austrian florins. Suppose the bill to be dishonoured. The holder is now, by the custom of merchants, entitled to immediate and specific redress, by his own act, in this way. He is entitled, being in Vienna, then and there to raise the exact number of Austrian florins, by drawing and negotiating a cross bill, payable at sight, on his indorser in London, for as much English money as will purchase in Vienna the exact number of Austrian florins, at the rate of exchange on the day of dishonour; and to include in the amount of that bill the interest and necessary expenses of the transaction. This cross bill is called in French the *retraite*. The amount for which it is drawn is called in low Latin *ricambium*, in Italian *ricambio*, and in French and English re-exchange. If the indorser pay the cross or re-exchange bill, he has fulfilled his engagement of indemnity. If not, the holder of the original bill may sue him on it, and will be entitled to recover in that action the amount of the *retraite* or cross bill, with the interest and expenses thereon. The amount of the verdict will thus be an exact indemnity for the non-payment of the Austrian florins in Vienna on the day of the maturity of the original bill.

According to English practice, the *retraite* or re-exchange bill is now seldom drawn, but the right of the holder to draw it is settled by the law merchant of all nations, and it is only by a reference to this supposed bill that the re-exchange, in other words, the true damages in an action on the original bill, can be scientifically understood and computed.

It is plain that whether the indorser gain or lose by the re-exchange depends (except in so far as relates to the expenses) on the rate of exchange between the two countries. If the value of the Austrian florin, measured in pounds sterling, has risen, the holder will be entitled to recover more than the original amount of the bill in English money (*x*). But if the value of the Austrian florin has declined, then the indorser may not be liable to repay as much English money as the bill was originally drawn for, unless the interest and expenses cover or exceed the difference (*y*).

(*x*) *De Tastet v. Baring*, 11 East, 265; 2 Camp. 65; 10 R. R. 499.

(*y*) *Suso v. Pompe*, 30 L. J., C. P. 75; 8 C. B., N. S. 538.

A custom among London merchants that the holder may at his election sue his indorser, either for the sum which the indorser received of him for the bill, or for the re-exchange, is inconsistent with the obligation appearing on the bill when interpreted by the law merchant, and therefore evidence of such a custom is inadmissible (z).

The drawer of a bill is liable to the re-exchange, though the bill be returned through never so many hands (a). But the acceptor has not been held liable to the re-exchange at common law, though it seems to be otherwise in Chancery (b).

Other damages not necessarily arising from the dishonour, as noting, postages, telegraphing, &c., were not recoverable unless specially stated in the declaration (c). But it has been held that postage was in some cases recoverable under the count for money paid (d).

OTHER
DAMAGES.
Expenses.

Though, after the principal sum due on a bill has been once paid, or levied upon the goods of the party ultimately liable, the holder cannot recover it again from any other of the parties, yet if other actions were pending at the time of payment, he may proceed in them for costs, without recovering any part of the principal sum (e).

Costs as
damages ;
Incurred by
plaintiff.

(z) *Suse v. Pompe*, supra ; *Willans v. Ayers*, L. R., 3 App. Ca. 133.

(a) *Mellish v. Simeon*, 2 H. Bl. 378 ; 3 R. R. 418.

(b) *Napier v. Schneider*, 12 East, 420 ; *Woolsey v. Crawford*, 2 Camp. 445. See now, however, Code, s. 57 ; *Walker v. Hamilton*, 1 D. F. & J. 602 ; *In re General South American Co.*, 7 Ch. D. 637 ; *Ex parte Robarts*, 18 Q. B. D. 286 ; 56 L. J., Q. B. 74. The case of *In re The Commercial Bank of Australia*, 36 Ch. D. 522, shows that the first two sub-sections of Code, s. 57, are not in the alternative ; but that in the case of a bill dishonoured in a foreign country, re-exchange with interest by sub-section (2) is to be recovered, but not interest under sub-section (1). In *Ex parte Robarts*, supra, when a bill drawn in Tobago was dishonoured here, a drawer who was liable to the holder for the re-exchange was held entitled to recover it from the acceptor.

(c) *Kendrick v. Lomar*, 2 C. & J. 405 ; 2 Tyr. 438. In which case it was held, that the bill having been renewed, the plaintiff could not recover the charges on the first bill while the second bill suspended the remedy on it. It seems doubtful whether the expense of noting an inland bill, not protested, can at common law in any case be recovered. Ibid. But see the Bills of Exchange Act, 18 & 19 Vict. c. 67, s. 5. See also *Rogers v. Hunt*, 10 Exch. 474 ; *Prehn v. Liverpool Bank*, L. R., 5 Ex. 92 ; 39 L. J. 41. *Quære*, if other charges are liquidated damages within s. 57.

(d) *Dickinson v. Hatfield*, 1 M. & Rob. 141 ; 5 Car. & P. 46. The defendant in this case directed the plaintiff to charge him with it. See the Chapter on PROTEST. As to nominal damages, see *Beaumont v. Greathead*, 2 C. B. 495. See now Code, 57, 1 (c).

(e) *Toms v. Powell*, 7 East,

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Recovered by
other parties
against
plaintiff.

Indorsers, who have to pay costs of actions against them, cannot sustain an action for those costs against the acceptor (*f*), nor, it is conceived, against any other party.

In common language, a bill accepted or indorsed without any consideration moving to the party making himself liable on the bill, is called an accommodation bill; but, in strictness (*g*), an accommodation bill is not merely a bill accepted or indorsed without value received by the acceptor or indorser, but a bill accepted or indorsed without value by the acceptor or indorser, *to accommodate* the drawer, or some other party; *i.e.*, that the party accommodated may raise money upon it, or otherwise make use of it. This distinction is of importance; for a party accepting a bill merely without consideration (as if, for example, he does not know the state of accounts between himself and the drawer), and afterwards sued on that bill, cannot charge the drawer with the costs of defending the action (*h*); whereas, the acceptor of an accommodation bill, properly so called, who is compelled by an action to pay it, may have a claim upon the drawer for all the expenses of the action (*i*).

But an accommodation acceptor has no right to charge the party accommodated with the costs of an action, to which the accommodation acceptor had evidently no defence (*k*).

COSTS.
Before judge.

If the case is tried before a judge without a jury the costs are in the discretion of the judge (*l*).

With jury.

But if the action is tried with a jury, the costs will follow the event, unless the judge or the Court for good cause otherwise order (*m*).

536; 3 Smith, 554; 6 Esp. 40; *Page v. Wiple*, 3 East, 314; 7 R.R. 470; *Godard v. Benjamin*, 3 Camp. 33; *Holland v. Jourdine*, Holt's N. P. C. 6; *Goodwin v. Cremer*, 18 Q. B. 757.

(*f*) *Dawson v. Morgan*, 9 B. & C. 618.

(*g*) See ante, pp. 143, 155.

(*h*) *Bagnall v. Andrews*, 7 Bing. 217; 4 Moo. & P. 839. Compare *Tindal v. Bell*, 11 M. & W. 228; *Ronneberg v. Falkland Islands Company*, 17 C. B., N. S. 1.

(*i*) *Ex parte Marshall*, 1 Atk. 262; *Jones v. Brooke*, 4 Taunt. 464; *Stratton v. Matthews*, 18 L. J., Exch. 5; 3 Exch. 48;

Garrard v. Cottrell, 10 Q. B. 679.

(*k*) *Roach v. Thompson*, M. & M. 487; *Beech v. Jones*, 5 C. B. 696.

(*l*) Ord. LXV. r. 1; Jud. Act, 1890, s. 5. But this discretion is judicial. *Cooper v. Whittingham*, 15 Ch. D. 501. Though for sufficient reason the party who succeeds may be ordered to pay the costs of his opponent. *Harris v. Petherick*, 48 L. J., Q. B. 521; 4 Q. B. D. 611.

(*m*) Ord. LXV. r. 1. The application to the judge who tries the action to "otherwise order" need no longer be made "at the trial."

But the Judicature Acts(*n*) expressly preserved the operation of sect. 5 of the County Court Act of 1867 (*o*), which makes a certificate of the judge necessary to entitle a plaintiff to his costs "who recovers" (*p*), not more than 20*l.* in contract, or 10*l.* in tort. And that section applied where the plaintiff's whole claim was within the County Court jurisdiction, and the amount was further reduced to the 20*l.* or 10*l.* limit by an established set-off, but not if the claim was so reduced by a counterclaim, for this is in the nature of a cross action, whereas set-off is a defence (*q*).

The corresponding provisions now in force are those of the County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 116, which is expressly limited to actions which could have been commenced in the County Court (*r*).

By R. S. C., 1883, a further discouragement to proceeding in the superior Court is provided in the rule that in actions on contract in which the plaintiff recovers by judgment or otherwise, a sum, exclusive of costs, *not exceeding* 50*l.*, he shall be entitled to no more costs than he would have been entitled to had he brought his action in the County Court, unless the Court or a judge otherwise orders (*s*).

(*n*) 36 & 37 Vict. c. 66, s. 67.

(*o*) 30 & 31 Vict. c. 142; repealed by C. C. Act, 1888, s. 188.

(*p*) An amount paid into Court and accepted in satisfaction was recovered within this section. *Houlding v. Tyler*, 3 B. & S. 472; *Baylis v. Linlott*, L. R., 8 C. P. 345.

(*q*) *Stooke v. Taylor*, 49 L. J., Q. B. 857; 5 Q. B. D. 569.

(*r*) In case of any such action being brought in the High Court, then, if the plaintiff recovers less than 20*l.* in contract or 10*l.* in tort, he is entitled to no costs. And if he recovers 20*l.* but less than 50*l.* in contract, or 10*l.* but less than 20*l.* in tort, he is not to have any more costs than he would have been entitled to in the County Court; unless in any such action whether in contract or tort a judge of the High Court certifies that there was sufficient reason for suing in that Court, or unless the High Court or a judge thereof at Chambers shall by order allow costs (*Barker v.*

Hempstead, 23 Q. B. D. 8; *Bazett v. Morgan*, 24 Q. B. D. 48). Provided that if in contract the plaintiff shall within 21 days after service of writ or such further time as ordered obtain an order for judgment under Ord. XIV. of R. S. C., 1883, for 20*l.* or upwards, he shall be entitled to costs on the Supreme Court scale. By s. 117 of the same Act, where any such action is brought in any other Court than the High Court, and the verdict recovered is for less than 10*l.*, the plaintiff shall not recover from defendant more costs than he would have been allowed in a County Court, and there is no appeal without leave, Jud. Act, 1873, s. 49. As to costs in actions brought in the County Court, see C. C. Act, 1888, ss. 113, 118, 119; C. C. Rules, 1889, Ord. L. (a), and scales appended thereto.

(*s*) Ord. LXV. r. 12. See also Id. r. 27 (46); *Millington v. Harwood*, [1892] 2 Q. B. 166. These rules only apply where the action could have been brought in a County Court. *Saywood v. Cross*,

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Certificate or order for, when necessary, to entitle successful plaintiff to costs.

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JUDGMENT.

Judgment shall be entered by order of the judge at or after the trial (*t*); and in general no motion is now required (*u*).

EXECUTION.

The subject of execution is now provided for by the Rules of 1883 (*r*), and the Sheriffs Act, 1887.

Abuse of process will be restrained.

After a party has levied the amount of the debt upon the goods of one of the parties liable on the bill, the Court will restrain him from levying it over again on the goods of another, and have intimated that they would punish a plaintiff who should take out execution on both judgments (*y*).

Abolition of arrest on mesne process and imprisonment for debt.

A defendant cannot now be arrested in England in an action in a superior Court, unless the plaintiff prove by evidence on oath to the satisfaction of a judge, that he has a good cause of action to the amount of 50*l.* (*z*) or upwards, and that there is probable cause for believing that the defendant is about to quit England, and that his absence will materially prejudice the plaintiff in the prosecution of his action (*a*), and all imprisonment for non-payment of money, except as contempt of Court, is now abolished.

14 Q. B. D. 53; 54 L. J., Q. B. 17. And as to costs in actions on Bill of Exchange under 50*l.*, see Central Office Practice Rules, 1880-88 (18), Fixed Costs, Table F.

(*t*) Ord. XXXVI. r. 39.

(*u*) Id. See as to motion for judgment, Ord. XL.

(*r*) Ord. XLII.; see also Bankruptcy Act, 1890, ss. 11, 12.

(*y*) *Windham v. Wither*, 1 Stra.

515; *Ex parte Wyldman*, 2 Ves. Sen. 115.

(*z*) Formerly 20*l.* 1 & 2 Vict. c. 110, s. 3.

(*a*) 32 & 33 Vict. c. 62, s. 6; 41 & 42 Vict. c. 54, s. 6, does not extend beyond final judgment, *Hume v. Drayff*, L. R., 8 Ex. 214. And see Bankruptcy Acts, 1883, s. 25; 1890, s. 7. As to process, Ord. LXIX.

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CHAPTER XXVII.

To discuss at length the subject of bankruptcy would far exceed our limits. It is proposed, therefore, to give an outline of the law so far as it relates to bills of exchange and promissory notes, and when necessary from time to time to refer to the statute law as it existed before the present Acts (a).

(a) 46 & 47 Vict. c. 52 (1883); amended by 53 & 54 Vict. c. 71 (1890). The power of petitioning against himself given by the Act of 1849, s. 3, and the Act of 1861, s. 86, but not renewed under the Act of 1869, is now restored by the Act of 1883. See ss. 4 (1), 5 and 8. The ancient distinction between traders and non-traders, in determining what constitutes

an act of bankruptcy, is abolished (sect. 4 (1), and is now only material incidentally, *e.g.* as to what is required of a trader before obtaining discharge (sect. 28 (2)), and as to certain goods in the order and disposition of the debtor in his *trade* or business, with consent of owner, becoming divisible among creditors (sect. 44 (2), iii).

The acts of bankruptcy upon which a petition may now be founded are :—(a) Assignment by the debtor of his property to trustee for benefit of his creditors generally ; (b) fraudulent conveyance or transfer of property ; (c) conveyance or transfer of property or charge thereon which would be void as a fraudulent preference if he were adjudged bankrupt ; (d) departing or remaining out of England, or departing from his dwelling-house, or otherwise absenting himself, or beginning to keep house with intent to defeat and delay his creditors ; (e) the levy of execution against him by seizure and sale of his goods ; or, after 1890, holding of them by sheriff for 21 days exclusive of interpleader proceedings ; (f) the filing by him of a declaration of inability to pay his debts, or the presenting by him of a bankruptcy petition against himself ; (g) failure to comply with the requirements of a bankruptcy notice within the prescribed time, or to satisfy the Court that he has a set-off, counter-claim or cross-demand, at least equal to the debt, and which he could not set up in the action in which the judgment was obtained ; (h) giving notice to any of his creditors that he has suspended, or is about to suspend, payment of his debts (b) ; to which must be added : (i) the making of a receiving order against him in lieu of committal upon a judgment debtor's summons, by consent of the creditor (c).

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ACTS OF
BANK-
RUPTCY :
generally.

A bill given by the bankrupt to a petitioning creditor after bankruptcy was a void transaction within the express provisions of the Act of 1849, and might be an additional act of bankruptcy (d). And the same result would appear to follow from the provisions of the Act of 1883 (e).

In respect of
bills.

(b) Bankruptcy Acts, 1883, s. 4, 1890, s. 1.

(c) 1883, s. 103 (5). Both the judgment summons and the debtor's summons procedures, as established in 1869, have undergone considerable modification. The use of the debtor's summons as a "screw" for the recovery of debts, strongly condemned in *Ex parte Sewell*, L. R., 13 Ch. D. 266, is now at an end. The debt must first be established by final judgment. On that judgment the creditor may conclude that the debtor is able, but unwilling to pay, or he may believe him to be insolvent. In the *former* case he will in future take out a judgment debtor's summons (which is now bankruptcy business), and the

Court may either commit, or, with the consent of the creditor, make a receiving order, in like manner as upon a petition founded on failure to comply with a bankruptcy notice. In the *latter* case the creditor (or his executor or administrator on leave obtained for execution under Ord. XLII. r. 23, *Ex parte Woodall*, 13 Q. B. D. 479, but not an assignee of the judgment, *Re Keeling*, 17 Q. B. D. 303 ; 55 L. J. Q. B. 327, but see now Act of 1890, sect. 1), may proceed by bankruptcy notice and petition to receiving order in the first instance.

(d) See 12 & 13 Vict. c. 106, ss. 71 and 268 ; *Rose v. Main*, 1 Bing. N. C. 357 ; 1 Scott, 127.

(e) Sects. 4 (c), 48 and 49.

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If a debtor, with the requisite intent, deny himself to the holder of a bill on the morning of the day when it is payable, though he pay it the same day, that is an act of bankruptcy (*f*).

A bill of exchange is a chattel, the fraudulent transfer of which was an act of bankruptcy within the 6 Geo. 4, c. 16, s. 3 (*g*), and within the 12 & 13 Vict. c. 106, s. 67; and a fraudulent transfer of a bill of exchange is also clearly an act of bankruptcy within the Act of 1883 (46 & 47 Vict. c. 52), s. 4 (1) (*b*).

If the creditor after serving a bankruptcy notice on the debtor takes from him a bill for the judgment debt, such bill is a sufficient compliance with the notice to prevent the creditor from founding a petition on the notice during the currency of the bill (*h*).

PETITIONING
CREDITOR'S
DEBT:
When a bill
may be.

A bill of exchange of 50*l.* may be a good petitioning creditor's debt, though it be not due, and that against the drawer, though, after the bankruptcy, it be duly presented and paid by the acceptor (*i*). A bill taken up by the drawer, after the acceptor has committed an act of bankruptcy, but before adjudication, will constitute a good petitioning creditor's debt (*k*). Interest cannot be reckoned, for this purpose, as part of the debt, unless made payable on the face of the bill (*l*).

Though a bill be for the exact sum of 50*l.*, and not due at the time of the act of bankruptcy, the rebate of interest will not make it an insufficient petitioning creditor's debt (*m*).

(*f*) *Colkett v. Freeman*, 2 T. R. 59; 1 R. R. 421; and see *Bleasby v. Crossley*, 2 C. & P. 213.

(*g*) *Cumming v. Bailey*, 6 Bing. 363; 4 Moo. & P. 36; 31 R. R. 438.

(*h*) *In re Mathew*, 12 Q. B. D. 506; 1 Morrell, 47.

(*i*) *Ex parte Douthat*, 4 B. & Ald. 67; *Ex parte Raatz*, [1897] 2 Q. B. 80; Act of 1883, sect. 6 (1) a. But a bill at maturity must be presented, and due notice given to the drawer, or it will not constitute a good petitioning creditor's debt against him. *Cooper v. Machin*, 1 Bing. 426; 8 Moo. 536; *Ex parte Wolfe*, [1896] 1 Q. B. 616, where there was a promise to renew.

(*k*) *Ex parte Cyrus*, L. R., 5 Ch. App. 177. The release of the bankrupt dates from the order of discharge, and not from

the adjudication. *Jones v. Hill*, L. R., 5 Q. B. 30.

(*l*) *Cameron v. Smith*, 2 B. & Ald. 305; 20 R. R. 444; *In re Burgess*, 8 Taunt. 660; 2 Moo. 745; Buck, 412. And though interest is made recoverable as liquidated damages by Code, s. 57 (1) (*b*), yet the effect of sub-sect. (3) may be to make interest, even when payable on the face of the bill, an uncertain quantity and therefore improper to be reckoned in the debt. On the other hand the effect of the section, as a whole, may be to make interest in all cases proper to be included as a liquidated demand. See *Ex parte Furber, R. King*, 17 Ch. D. 191. See also post as to proof of interest, p. 465.

(*m*) *Brett v. Levett*, 13 East, 213; 1 Rose, 112.

Where there is a specific exchange of accommodation acceptances, and before the bills are at maturity one of the parties commits an act of bankruptcy, it has been held that the bankrupt's acceptance is not a sufficient debt to support a commission, until the petitioning creditor has paid his own acceptance (*n*). The debt must have existed at the date of the act of bankruptcy. Therefore, where an acceptor, for the accommodation of the bankrupt before an act of bankruptcy, paid the amount after an act of bankruptcy, it was held, that this payment, being after an act of bankruptcy, did not support the commission (*o*). A bill or note which could not be sued on at law (*p*), or against law proceedings on which equity would enjoin, is not a good petitioning creditor's debt (*q*).

It was at one time doubtful whether, if a bill existing before the act of bankruptcy were indorsed to the petitioning creditor after the act of bankruptcy, the indorsee would be entitled to a bankruptcy commission (*r*). But it is now clear, that though the debt on which the petition is founded must have existed before the act of bankruptcy, it need not have so existed in the petitioning creditor; the indorsee represents his indorser (*s*). But it must appear that there was a good petitioning creditor's debt in the petitioner at the time of the petition, and therefore it must be shown that the bill or note was indorsed to the petitioner before he petitioned (*t*). If, at the time of the act of bankruptcy and at the time of the petition, a bill given to a creditor were outstanding in the hands of an indorsee, neither the original debt due to the creditor, nor the bill, will enable the original creditor to support a petition (*u*). Prior to the Married Women's

(*n*) *Surratt v. Austin*, 4 Taunt. 200; 2 Rose, 112.

(*o*) *Ex parte Holding*, 1 G. & J. 97; see also *Ex parte Hayward*, L. R., 6 Ch. Ap. 546.

(*p*) *Richmond v. Heapy*, 1 Stark. 202; *Buckland v. Newsame*, 1 Taunt. 477; 1 Camp. 474. But see now Act of 1883, s. 37.

(*q*) *Ex parte Page*, 1 G. & J. 100.

(*r*) *Ex parte Lee*, 1 P. Wms. 782.

(*s*) *Ex parte Thomas*, 1 Atk. 73; *Anon.*, 2 Wils. 135; *Bingley v. Maddison*, 1 Co. B. L. 32; *Glaister v. Hewer*, 7 T. R. 498. Before the year 1806, the petitioning creditor's debt must have existed before any act of bankruptcy, on the principle that a

man who has committed an act of bankruptcy has no power to contract so as to bind his estate. But it was provided by the 46 Geo. 3, c. 135, s. 5, that the commission should not be defeated by an act of bankruptcy prior to the petitioning creditor's debt, of which act of bankruptcy the petitioning creditor had no notice. And now no bankruptcy petition is invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor. 46 & 47 Vict. c. 52, s. 43.

(*t*) *Rose v. Rowcroft*, 4 Camp. 245.

(*u*) *Ex parte Botten*, 1 Mont. & Bl. 412; *Ex parte Magnus*, 11 L. J., B. & K. 52.

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Property Acts, it was held that when a bill or note was given to the wife *dum sola*, the husband alone might petition (*x*).

Evidence of
the date of a
bill.

The date appearing on the bill has been held *prima facie* evidence that it existed before the act of bankruptcy (*y*). Assignees producing a bill or note or other written acknowledgment of the bankrupt as evidence of a petitioning creditor's debt must show by extrinsic evidence that the instrument existed before the act of bankruptcy (*z*). From the date of the drawing or making the date of an indorsement cannot be inferred (*a*).

VESTING OF
BANKRUPT'S
PROPERTY IN
TRUSTEE.

Immediately on adjudication (*b*) all the bankrupt's property (*c*), including bills and notes, but exclusive of trust

(*x*) *Ex parte Barber*, 1 G. & J. 1; *McNeillage v. Holloway*, 1 B. & Ald. 218.

(*y*) *Goodtitle v. Milburn*, 2 M. & W. 853; *Sinclair v. Baggaley*, 4 M. & W. 312; *Smith v. Battens*, 1 Mood. & R. 341; *Taylor v. Kinloch*, 1 Stark. 175; *Obbard v. Betham*, M. & M. 483; *Potez v. Glossop*, 2 Exch. 195; *Davis v. Lowndes*, 7 Scott, N. R. 195; *Malpas v. Clements*, 19 L. J., Q. B. 435; but further evidence may be required, *Anderson v. Weston*, *infra*.

(*z*) *Wright v. Lainson*, 2 M. & W. 739; 6 Dowl. 146; and see *Anderson v. Weston*, 6 Bing. N. C. at p. 301; 8 Scott, 583; *Fletcher v. Manning*, 12 M. & W. 571.

(*a*) *Rose v. Rowcroft*, 4 Camp. 245; *Cowie v. Harris*, M. & M. 141.

(*b*) On petition the Court may immediately stay all legal proceedings (Act 1883, ss. 10 (2), 11), and appoint the official receiver an interim receiver, and direct him to take immediate possession of the debtor's property. The next step is the making of the receiving order, under sect. 5, upon the making of which no creditor can sue or have any remedy for any debt provable (sect. 37) in bankruptcy without the sanction of the Court (sect. 9 (1)), though secured creditors may realize or deal with their

securities: (sect. 9 (2)). The receiving order is gazetted and advertised (sect. 13), and the creditors meet to consider whether composition or arrangement shall be entertained, or whether the debtor should be adjudged bankrupt (sect. 15). The debtor makes his statement of affairs (sect. 16) under pain of being adjudged bankrupt (sect. 16 (3)), and has then four days within which to propound a scheme for composition; he is then publicly examined as to his conduct, dealings, and property, and if no scheme be approved under sect. 3 of Act of 1890, he may, under sect. 20, be adjudged a bankrupt, with the consequences mentioned in the text.

(*c*) "Property" is used in its most extensive sense in the interpretation clause: sect. 168 (which follows the language of sect. 4 of the Act of 1869). And sect. 168 must be read with sect. 44, which specifies certain classes of property, and contains (clause iii.) the important provisions which render goods in the possession, order or disposition of the bankrupt at the commencement of the bankruptcy in his trade or business, by the consent or permission of the true owner, under certain circumstances, divisible as property of the bankrupt among his creditors. See post, p. 476, note (*t*).

property (*d*), and of tools of trade, apparel and bedding, to the value together of 20*l.* (*e*), becomes divisible among his creditors, and vests in a trustee (*f*); and the property vests in and passes from trustee to trustee in the proceedings without any conveyance, assignment or *transfer* whatever (*g*).

The commencement of the trustee's title depends upon the doctrine of relation, which has undergone important changes under the successive Bankruptcy Acts.

Doctrine of
relation.

Under the Act of 1869 (32 & 33 Vict. c. 71), s. 11, the title of the trustee was made to relate back to the act of bankruptcy on which the adjudication was founded. And if there were several acts of bankruptcy, then to the earliest within twelve months before the adjudication; but not to any prior act of bankruptcy, unless the bankrupt were then indebted to a creditor or creditors in a sum sufficient to support a petition for adjudication, and that debt or those debts were still due.

And now by the Act of 1883 (46 & 47 Vict. c. 52), s. 43, the title of the trustee has relation back to the committing of the act of bankruptcy on which a receiving order is made; or, if more acts than one have been proved, then to the first of such acts committed within three months next before the presentation of the petition; or, if a receiving order have been made under s. 103, next before the date of that order (Act of 1890, s. 20).

Next, as to protected and void transactions. Conveyances, contracts and other transactions by the bankrupt, and executions against him, though after an act of bankruptcy, if without notice of it, and more than two months before the issuing of the fiat, were valid even before the general Bankrupt Act of 1849 (*h*).

PROTECTED
DEALINGS :
under former
Acts.

Thus, where a bill of exchange was delivered by a bankrupt, with intent to transfer the property, more than two months before the commission issued, though not actually

(*d*) Sect. 44 (1). Where cheques have been paid in to a banker who becomes bankrupt, the test is whether (*a*) they were paid in to collect and remit, or (*b*) to use and repay the amount on demand. If (*a*), then there is a trust and confidence, and the money can be recovered in full; if (*b*), it is a mere case of banker and customer, and the latter can only prove for

dividend. *In re Brown, Ex parte Plitt*, 6 Morrell 81; 60 L. T. N. S. 397.

(*e*) *Id.* (2).

(*f*) That is, the official receiver, by sect. 54, till a trustee is appointed by the creditors or by the Board of Trade, under sect. 21.

(*g*) Sect. 54 (3).

(*h*) See 6 Geo. 4, c. 16, s. 81.

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indorsed till within the two months, it was holden to vest in the indorsee, and not in the assignees (*i*).

And all *bonâ fide* payments by or to any bankrupt, and all contracts, dealings and transactions with the bankrupt before the filing of a petition for adjudication, without notice of an act of bankruptcy, were protected (*k*).

Purchasers of any property from the bankrupt *bonâ fide* and for valuable consideration after an act of bankruptcy and *with notice* thereof, were protected, unless a petition for adjudication of bankruptcy should have been filed within twelve months after such act of bankruptcy (*l*).

The title to property sold under an adjudication of bankruptcy could not be impeached by the bankrupt, or any person claiming under him, unless the bankrupt had commenced proceedings to annul the adjudication within twenty-one days from its advertisement in the "Gazette" (*m*).

Under Act of
1869.

By the Act of 1869 (32 & 33 Vict. c. 71), s. 92, all honest payments to a bankrupt for value received, all contracts or dealings with the bankrupt made in good faith and for valuable consideration, before adjudication and without notice of an act of bankruptcy available for adjudication, were protected.

VOID DEAL-
INGS :
under former
Acts or at
common law.

On the other hand, if, on behalf of the general creditors, it could be shown that a transaction was fraudulent or contrary to the express provision or policy of the bankruptcy law, it might be set aside either by the common law or by virtue of the specific provisions contravened.

Voluntary
settlements.

By sect. 47 of the Act of 1883, which reproduces, with some variations, sect. 91 of the Act of 1869, any settle-

(*i*) *Anon.*, 1 Camp. 492, n.

(*k*) 12 & 13 Vict. c. 106, s. 133, repealing and re-enacting 2 Vict. c. 11, and 2 & 3 Vict. c. 29.

(*l*) 12 & 13 Vict. c. 106, s. 134; see sect. 86 of 6 Geo. 4, c. 16.

(*m*) 12 & 13 Vict. c. 106, ss. 131 and 233. Further periods were given to him if he were out of the United Kingdom. Sect. 233.

Under the Act of 1883, s. 35, and Gen. Rules of 1886 and 1890, r. 130, the time for appealing from an order of adjudication is twenty-one days from the date of the order (subject to enlargement by the Court), and the

effect of annulment of the adjudication under that section is that all dispositions of property and payments made or acts done by the official receiver or trustee are valid; but the property of the debtor vests in such person as the Court appoints, or, in default of appointment, reverts to the debtor, on such terms and conditions, if any, as the Court may declare by order. See *Bailey v. Johnson*, L. R., 7 Ex. at p. 265; per Cockburn, C. J., as to effect of similar provisions in the Act of 1869.

ment (*n*) of property, with certain exceptions (including a pre-nuptial settlement in consideration of marriage, and a sale or incumbrance in good faith and for valuable consideration), is, if the settlor becomes bankrupt within two years, void as against the trustee in bankruptcy, and even within ten years, unless the parties claiming under the settlement can prove that at the date of the settlement the settlor was able to pay all his debts without the aid of the property settled.

Prior to the Act of 1869, if a debtor, in contemplation of bankruptcy, voluntarily, *i.e.*, without pressure, delivered or paid goods or money to a creditor intending to give him a preference over the others and leave them "the mere husk," the transaction was voidable as against the assignee in bankruptcy (*o*).

Fraudulent
preference
prior to 1869.

That Act, which placed the administration of the affairs of the bankrupt chiefly in the hands of the creditors, and not as formerly—and again now—in those of a judicial tribunal, introduced a definite test (*p*) as to what preference should be deemed to be in contemplation of bankruptcy; and, accordingly, by sect. 92 it was provided that if made within three months prior to the bankruptcy by a person unable to pay his debts, such preference should be deemed fraudulent and void as against the trustee, but not so as to affect the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration.

Under Act of
1869.

And this provision is reproduced in the Act of 1883, s. 48 (1), with this difference, that whereas under the proviso to sect. 92 of the Act of 1869, a creditor fraudulently preferred, but without notice that he was being fraudulently preferred, was held (*q*) to be protected; the protection under sect. 48 (2) of the Act of 1883 is extended only to those who make title in good faith and for valuable consideration through or under a creditor of the bankrupt.

PROTECTED
AND VOID
DEALINGS
under Act of
1883.

And now the law, as to the effect of bankruptcy on antecedent transactions, is thus summed up in sect. 49 of the Act of 1883.

"Subject to" the provisions of the Act with respect to

(*n*) Including any conveyance or transfer. *Id.* (3).

(*o*) *De Tastet v. Carroll*, 1 Stark. 89; 18 R. R. 478.

(*p*) *Butcher v. Stead*, L. R., 7

H. L. 839; *Ex parte Griffith, Re Wilcoxon*, L. R., 23 Ch. D. 69;

Ex parte Hill, Re Bird, *Id.* 693.

(*q*) *Butcher v. Stead*, L. R., 7

H. L. 839.

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execution or attachment (*r*), and with respect to the avoidance of certain settlements (*s*) and preferences (*t*), “nothing in this Act shall invalidate in the case of a bankruptcy any payment by the bankrupt to any of his creditors, any payment or delivery to the bankrupt, any conveyance or assignment by the bankrupt for valuable consideration, any contract, dealing, or transaction by or with the bankrupt for valuable consideration”: Provided that, (1) the transaction in question is before the date of the receiving order; (2) the person so dealing with the debtor has not at the time of the transaction notice of any prior available act of bankruptcy (*u*).

Available act
of bank-
ruptcy.

An available act of bankruptcy means any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made.

What
amounts to
notice of an
act of bank-
ruptcy.

It seems that the expression, “notice of an act of bankruptcy,” is satisfied by a general notice that the party has committed an act of bankruptcy. And that notice of the specific act is not necessary (*x*). It may be given to the party’s attorney (*y*); but not to a mere clerk in the attorney’s office not having the management of the affair (*z*). It may be given to the accredited agent of a

(*r*) See sect. 45 (1), which requires that in order that the execution or attachment should hold good against the trustee in bankruptcy, it must have been completed (in the manner described in sub-sect. (2)) before the date of the receiving order and before notice of the petition or any available act of bankruptcy. Sect. 11 of the Act of 1890 regulates the duties of a sheriff, and provides (inter alia) that in executions for debt above 20*l.*, he is to hold the proceeds for fourteen days, to give time for notice of any bankruptcy petition to be served upon him. Sub-sect. (2).

(*s*) Act of 1883, sect. 47.

(*t*) Sect. 48.

(*u*) Payment in due course of a trade bill accepted while the debtor was still solvent is not a fraudulent preference, *In re Clay*, 3 Mans. 31; but in *Ex parte*

Viney, [1897] 2 Q. B. 16, it was held that subsequent payment of a bill held over at request might be; and so, too, payment to a surety who had not paid, *Ex parte Read*, [1897] 1 Q. B. 122.

(*r*) *Udal v. Walton*, 14 M. & W. 254; and see *Conway v. Nall*, 1 C. B. 643; *Follett v. Hoppe*, 17 L. J., C. P. 76. But the notice must not be equivocal. *Evans v. Hullam*, L. R., 6 C. B. 713.

(*y*) *Rothwell v. Timbrell*, 1 Dowl., N. S. 779.

(*z*) *Pike v. Stevens*, 12 Q. B. 465; see *Pennell v. Stephens*, 18 L. J., C. P. 291; *Fawcett v. Fearne*, 6 Q. B. 20; *Green v. Steer*, 1 Q. B. 710. Notice to the sheriff is not sufficient to defeat an execution. *Ramsay v. Eaton*, 10 M. & W. 22; *Ex parte Schulte*, L. R., 9 Ch. 409. As to notice of a receiving order, see Act 1890, sect. 11.

body corporate or public company (*a*). It may be by post (*b*) or telegram (*c*), or arise out of the creditor's own transactions (*d*).

It is therefore a sufficient reason for a banker to decline to honour his customer's cheque, that he has notice of an available act of bankruptcy committed by the customer; and if the banker pay the cheque under such circumstances, he may be compelled to pay over again to the trustee (*e*).

And although in sect. 49 of the Act of 1883, neither the term "*bonâ fide*" (as in sect. 133 of the Act of 1849) nor "in good faith" (as in sect. 94 of that of 1869) is to be found; yet the protection afforded is expressly subject to the important sections which we have noticed as to voluntary settlements and fraudulent preferences. And the use in sect. 49 of the words, "nothing *in this Act* shall invalidate," &c., would seem to leave the transactions in question still open to any objections arising outside the Act, *e.g.*, as to being contrary to the Statute of Elizabeth, or void at common law, as an evasion of the bankruptcy laws.

We have now glanced at some of the general features of the bankruptcy law—the acts of bankruptcy, the nature of the petitioning creditor's debt, the principles which regulate the vesting of the debtor's property in the trustee, the relation back of his title to the act of bankruptcy, the considerations upon which some transactions with the bankrupt are upheld in favour of innocent parties, and others are set aside as against parties not having the same claim to protection. Let us next pass to the proof of debts, and hereunder to a brief review of the subject of set-off and mutual credit in bankruptcy (*f*). We can then turn to the application of the bankrupt's estate to meeting the liabilities so established,

Division of
subject.

(*a*) Though the express enactment to this effect in sect. 87 of the Act of 1849 is no longer in force, such notice would seem sufficient on principle: *Brewin v. Briscoe*, 2 Ell. & B. 116; 28 L. J., Q. B. 329; due regard being had to the scope of his authority and employment. Act 1883, sect. 148.

(*b*) *Loader v. Hiscock*, 1 F. & F. 132.

(*c*) *Ex parte Langley*, 13 Ch. D. 110.

(*d*) *Ex parte Dawes*, L. R. 19

Eq. 438.

(*e*) *Vernon v. Hankey*, 2 T. R. 119; 1 R. R. 444; *Rogers v. Whiteley*, [1892] Ap. Ca. 118. In *Ex parte Ward*, 76 L. T., N. S. 203, until a declaration had been obtained declaring the balance standing in the wife's name to be the husband's, the banker was justified in cashing her cheques, though a receiving order had been made against the husband.

(*f*) As to set-off in an action, see Chapter on REMEDIES, p. 425.

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and thence to the position of the bankrupt during the bankruptcy, and after obtaining his order of discharge.

The Code expressly preserves the rules of bankruptcy in relation to bills of exchange, promissory notes, and cheques (*g*).

PROOF OF
DEBTS.

And first, as to proof of debts.

In what cases the holder may prove.

In almost all cases where a bankrupt would be liable to an action at law or suit in equity by the holder of a bill or note, the holder may prove on the bankrupt's estate for the amount. And whatever would be a defence to a suit in law or equity, will be an answer to such proof (*h*). All debts and liabilities, present or future, certain or contingent, to which the debtor is subject at date of the receiving order, or before discharge if incurred before receiving order, including even unliquidated damages arising from a breach of contract, promise, or trust, are now provable (*i*).

Production of bill to trustee.

Subject to section 70 of the Code (as to lost instruments) and to the general dispensing power of the Court, every bill or note on which proof has been made must be produced to the trustee before payment of any dividend thereon, and the amount of the dividend is to be indorsed on the instrument (*k*).

The good part of a bill may in some cases in the event of bankruptcy be separated from the bad. Where a stock-jobber having a large sum of money in his hands to be employed in stock-jobbing transactions, contrary to the 7 Geo. 2, c. 8, diverted part to his own use, and gave promissory notes to his employer, they were allowed to be proved only to the extent of the money diverted from the illegal purpose to the stock-jobber's own use (*l*): "The equity is," said the Lord Chancellor, "that where the consideration consists of two parts, one bad, the other good, the bill shall stand as to what is good" (*m*). Where a bill of

(*g*) Sect. 97.

(*h*) See *Ex parte Dewdney*, 15 Ves. 495; *Ex parte Smith*, 3 Bro. C. C. 1; *Ex parte Wilson*, 11 Ves. 410; 8 R. R. 194; *Ex parte Gifford*, 6 Ves. 807; 6 R. R. 53; *Ex parte Heath*, 2 V. & B. 240; *Ex parte Barclay*, 7 Ves. 596; *Ex parte Rofey*, 19 Ves. 488; 2 Rose, 245.

(*i*) Bankruptcy Act, 1883, s. 37. See also *Wood v. Demattos*, L. R.,

1 Ex. 100, and *Hoggarth v. Taylor*, L. R., 2 Ex. 105; *Robertson v. Goss*, L. R., 2 Ex. 396.

(*k*) Bankruptcy Rules, 1886 and 1890, rr. 221 and 233; *Ex parte Greenway*, 6 Ves. 812; *Ex parte Webster*, De G. 414.

(*l*) *Ex parte Bulmer*, 13 Ves. 313.

(*m*) *Ex parte Mather*, 3 Ves. 373.

exchange was transferred much under its real value, proof was allowed only of the sum actually paid (*n*).

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Bills, notes and other securities, not due at the time of the act of bankruptcy, may be proved, deducting a rebate of interest at five per cent., to be computed from the declaration of a dividend to the time for payment according to contract (*o*).

Bills not due.

The holder of a note payable on demand may prove though no demand has been made before the act of bankruptcy (*p*).

Proof of bill or note payable on demand.

A note payable at twelve months' notice, with interest, is provable against the estate of the maker, though he become bankrupt before any notice is given (*q*).

Bill payable after notice.

A bill or note defective in its necessary form, or void for want of a stamp (*r*), or payable on a contingency (*s*), or payable in notes (*t*), is not, *as a bill or note*, provable.

Irregular bill or note.

A bill, *as such*, cannot be proved against a man who is not a party to the instrument (*u*), though he give a written engagement, not on the bill, to guarantee the payment of it (*x*). But the holder may prove on such an engagement made before the bankruptcy (*y*). And in other cases the estate may be liable to proof for the consideration, though not for the bill itself (*z*).

Bill cannot be proved against one not a party to it.

And it has been held, that a person who passes a bill without indorsement, and takes it up after the acceptor has become bankrupt, will not be allowed to prove it against the acceptor's estate (*a*).

(*n*) *Jones v. Gordon*, 2 Ap. Ca. 616; *In re Gomersall*, 1 Ch. D. 137.

(*o*) 46 & 47 Vict. c. 52, Sched. II., r. 21.

(*p*) *Ex parte Beaufoy*, Cooke, Bkcy. Law, 180; Act 1883, s. 37.

(*q*) *Clayton v. Gosling*, 5 B. & C. 360; 8 D. & R. 110; *Ex parte Elgar*, 2 G. & J. 1; *Ex parte Downman*, 2 G. & J. 85, and 2 G. & J. 241; Act 1883, sect. 37.

(*r*) *Ex parte Manners*, 1 Rose, 68.

(*s*) *Ex parte Tootel*, 4 Ves. 372.

(*t*) *Ex parte Immeson*, 2 Rose, 225; *Ex parte Darison*, Buck, 31.

(*u*) *Ex parte Roberts*, 2 Cox, Eq. 171; *Ex parte Bird*, 4 De Gex & S. 273.

(*x*) *Ex parte Harrison*, 2 Cox, 172; 2 Bro. C. C. 614; *In re Barrington*, 2 Scho. & Lef. 112; 9 R. R. 61; *Ex parte Hustler*, 1 G. & J. 9.

(*y*) *Ex parte Bell*, 1 Mont. B. L. 194; and see *Ex parte Blackburn*, 10 Ves. 206; 7 R. R. 389; *Ex parte Rathbone*, Buck, 215; Act 1883, sect. 37 (8).

(*z*) *Ibid.*, and *Ex parte Robinson*, Buck, 113.

(*a*) *Ex parte Isbester*, 1 Rose, 20.

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Where drawer and drawee are the same person only one proof is allowed (*b*).

Drawer and drawee the same.

Proof by a surety or party liable for the debt of the bankrupt.

The former Bankrupt Act, 6 Geo. 4, c. 16, s. 52, and the corresponding provision in 12 & 13 Vict. c. 106, s. 173, enacted, that any person who, at the issuing of the commission, may have become, without notice of an act of bankruptcy, surety, or liable for the debt of the bankrupt, and shall have paid the debt or any part in discharge of the whole, though after the commission, shall, if the creditor have proved, stand in his place, and receive the dividends; and if the creditor have not proved shall be entitled to prove.

A man who was at law a principal, if he were in equity a surety, was within the section, the jurisdiction in bankruptcy being equitable as well as legal (*c*).

Hence, not only a party who was on the face of a bill or note surety for a bankrupt, but one who had accepted, drawn, made, or indorsed a bill or note for the accommodation of the bankrupt, might, at any time after he had paid it, prove the amount upon the estate, though he did not pay it till after the commission issued; for he was deemed a surety or person liable for the debt of the bankrupt within the statute (*d*), and was entitled, if the party to whom he paid the bill had proved his debt, to stand in his place as to the dividends and all other rights under the commission, and would be barred by the certificate (*e*). But an election by the holder to prove would not conclude the drawer, but the drawer having paid the holder might sue the bankrupt before certificate (*f*). Where, upon a dissolution of partnership, the partner continuing the business expressly agreed to assume the liabilities of the firm and to guarantee the retiring partners, and on his becoming bankrupt, they were obliged to pay a bill accepted by the firm, the retiring partners were considered as persons liable for the debts of the bankrupt, were entitled to prove under his commission, and were barred by his certificate (*g*). If the suretyship

(*b*) *Banco de Portugal v. Waddell*, 5 App. Ca. 161.

(*c*) *Wood v. Dodgson*, 2 M. & S. 195; 14 R. R. 628; *Ex parte Lloyd*, 1 Rose, 4.

(*d*) 6 Geo. 4, c. 16, s. 52; *Ex parte Lloyd*, 1 Rose, 4; *Bassett v. Dodgson*, 9 Bing. 653; 2 M. & Scott, 777; *Ex parte Yonge*, 3 V. & B. 40; 13 R. R. 135; 2 Rose, 40; *Stedman v. Martinnant*, 13 East, 427; *Haigh v. Jackson*, 3 M. & W. 598;

Ex parte Read, [1897] 1 Q. B. 122.

(*e*) *Bassett v. Dodgson*, 9 Bing. 653; 2 M. & Scott, 777.

(*f*) *Mead v. Braham*, 3 M. & S. 91; *Westcott v. Hodges*, 5 B. & Ald. 12; *Walker v. Pilbeam*, 4 C. B. 229.

(*g*) *Wood v. Dodgson*, 2 M. & Sel. 195; 14 R. R. 628; *Haigh v. Jackson*, 3 M. & W. 598; *Aflalo v. Fourdrinier*, 6 Bing. 306; M. & M. 334, n.

commenced before notice of an act of bankruptcy, it might be continued afterwards, as, for example, by the renewal of an acceptance (*h*). But where a bond or promissory note was given by a principal and several sureties, and one of the sureties became a bankrupt, his obligation was not considered to be a debt within the statute for which the co-sureties were liable (*i*). Where the accommodation acceptor had sustained special damage, an action for damage was barred by the certificate (*k*). Payment of a portion of the debt merely in discharge of the surety's personal liability was not a payment within the statute (*l*).

A holder has, subject to the power of the Court to restrain legal proceedings, an election to proceed by proof under the bankruptcy, or by action, but cannot do both ; yet he may proceed against some parties to the bill by action, and against others by proof under the bankruptcy ; and against the same party he may prove for one debt, and bring his action for another. "It is clear," observes the Court of Common Pleas, "that a creditor has a right to sue for, or to prove, each individual debt as may best suit his purpose" (*m*). But this defence to an action cannot be raised by plea (*n*). The holder may, however, by motion,

Holder may
and must
elect between
proof and
action.

(*h*) *Stedman v. Martinnant*, 13 East, 427.

(*i*) *Clements v. Langley*, 5 B. & Ad. 372 ; 2 N. & M. 269 ; *Wallis v. Swinburne*, 17 L. J., Exch. 179 ; 1 Exch. 203 ; and see the larger provision of 12 & 13 Vict. c. 106, ss. 177, 178. The liability of a surety to his co-surety on a joint and several promissory note was a liability to pay money on a contingency within the meaning of s. 178. *Adkins v. Farrington*, 29 L. J., Exch. 345 ; 5 H. & N. 586. So held, too, in *Wolmerhausen v. Gullick* [1893], 2 Ch. 514 ; the liability being a debt provable under sect. 37, Act of 1883. As to proof of distinct contracts by the same person jointly with others on the same bill of exchange or promissory note, see 24 & 25 Vict. c. 134, s. 152, and *Goldsmid v. Cazenove*, 7 H. of L. Cas. 785 ; 29 L. J., Bank. 17. Unliquidated damages from breach of contract, when provable : s. 153. See *Green v. Bucknell*, 8 Ad. & E. 701 ; *Roo-*

man v. Nash, 7 B. & C. 145.

(*k*) *Vansandau v. Corsbie*, 8 Taunt. 550 ; 2 Moo. 602 ; 20 R. R. 559 ; in error, 3 B. & Ald. 13 ; 22 R. R. 280.

(*l*) *Soutten v. Soutten*, 5 B. & Ald. 852.

(*m*) *Bridget v. Mills*, 4 Bing. 18 ; 12 Moore, 92 ; *Ex parte Grosrenor*, 14 Ves. 588 ; *Ex parte Glorer*, 1 G. & J. 270 ; *Watson v. Meder*, 1 B. & Ald. 121 ; *Harley v. Greenwood*, 5 B. & Ald. 95 ; 2 D. & R. 337 ; *Meud v. Braham*, 3 M. & Sel. 91 ; *Ex parte Lobbon*, 17 Ves. 334 ; 1 Rose, 219 ; *Adames v. Bridger*, 8 Bing. 314 ; 1 Moore & S. 438 ; *Ex parte Edward*, 1 Mont. & Mac. 116 ; 6 Geo. 4, c. 16, s. 59 ; 12 & 13 Vict. c. 106, s. 128. This defence, however, could not be made by plea. *Spencer v. Demmett*, L. R., 1 Ex. 123. As to the power of the Court to restrain under former Acts and rules, see *Ex parte Ditton*, 1 Ch. D. 557.

(*n*) *Spencer v. Demmett*, Law Rep., 1 Ex. 123.

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be put to his election, either to stay the action or relinquish his proof.

Mutual accommodation bills

The principal difficulties as to proof in respect of bills of exchange, arise where there has been mutual accommodation between the bankrupt and other parties.

Mutual accommodation may be either with a specific exchange of securities, or without a specific exchange of securities.

Where there has been a specific exchange of securities.

Mutual accommodation with specific exchange is, where the acceptance of A. is exchanged for the acceptance of B. to the same amount. In this case each party is bound to pay his own acceptance, and, in paying it, is not considered as surety for another (*o*).

What amounts to specific exchange.

It is not essential, in order to constitute a specific exchange of securities, that the acceptances given in exchange should be the acceptances of the party giving them, nor that the amounts or dates should be exactly the same (*p*).

Party to mutual specific exchange of paper must pay his own paper before he can prove.

Formerly, a party to a specific exchange of paper was allowed to prove the bankrupt's paper without having paid his own, the dividends being retained until he had paid his own paper; but now he must, before he can *prove*, take up his own bills, or exonerate the bankrupt's estate from the original debt (*q*).

Mutual accommodation without specific exchange.

Mutual accommodation without specific exchange will not create a debt from the acceptor to the drawer. But the acceptor is to be considered as a surety, and may recover what he pays as money paid to the drawer's use.

After holder has proved, no further proof.

If the holder of a bill has proved against the estate of the person for whose accommodation the bill was accepted, there can be no further proof by any one to whom the bill is returned, nor by the accommodation acceptor when he pays it (*r*).

(*o*) *Rolfe v. Caslon*, 2 H. Bl. 570; *Cowley v. Dunlop*, 7 T. R. 565; *Buckler v. Buttivant*, 3 East, 73.

(*p*) *Buckler v. Buttivant*, ubi sup.

(*q*) *Ex parte Beanfoy*, Cooke's Bank. L. 180; *Ex parte Lord Clanricarde*, ibid. 182; *In re*

Bourness and Padmore, ibid. 183; *Ex parte Blozham*, 8 Ves. 531; 5 R. R. 358; *Sarratt v. Austin*, 4 Taunt. 200; 2 Rose, 112. See *Ex parte Solarte*, 2 D. & C. 261.

(*r*) *Ex parte Road*, 1 G. & J. 224; *Ex parte Oriental Bank*, L. R., 7 Ch. App. 99; 41 L. J., 217.

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The mode of adjusting the accounts between two estates where there had been mutual accommodation paper, a cash balance, and a mutual bankruptcy, has much embarrassed the Courts (s).

Perhaps the result is, that when the bills remain in the hands of the bankrupts, the cash balance is the debt, but when they have been negotiated the doctrine in *Ex parte Read* applies (t).

When accommodation bills are in the hands of a third party, for a valuable consideration, he may prove the whole of each bill upon the estate of each of the parties to it, and receive dividends as far as the amount really due to him (u).

We have already considered the effect of the Code in making interest part of the damage on the dishonour of the bill (x), and how far interest or rebate thereof may be reckoned in fixing the amount of the petitioning creditor's debt (y). As to proving for interest it is provided by the Bankruptcy Act, 1883, Sched. II. r. 20, that on any sum certain overdue at the rate of receiving order and proveable in bankruptcy, whereon interest is not reserved, proof may be made for interest, not exceeding 4l. per cent., to the date of the order from the date fixed for payment by some written instrument, or from demand in writing notifying to the debtor that interest would thereafter be claimed (z). And by the Bankruptcy Act, 1890, s. 23, where a debt has been proved, and such debt includes interest, such interest shall for dividend be calculated at a rate not exceeding 5l. per cent., without prejudice to a higher rate out of any surplus.

And should there be any surplus after the debts proved

Cases of mutual accommodation without specific exchange, mutual bankruptcy and cash balance.

Accommodation bills in the hands of an indorsee for value.

Proof of interest.

(s) See *Ex parte Walker*, 4 Ves. 373; 4 R. R. 218; *Ex parte Earle*, 5 Ves. 833; *Ex parte Rawson*, 1 Jac. 274; 23 R. R. 51; *Ex parte Metcalfe*, 11 Ves. 404; 8 R. R. 190; *Ex parte La Foreste*, 2 D. & C. 199, 1 M. & B. 363.

(t) See, however, the provision of the former Act, 32 & 33 Vict. c. 71, s. 31; and as to mutual credit and set-off, s. 39 of that Act, and s. 38 of the Act of 1883, post, p. 471.

(u) *Ex parte King*, Cooke's B. L. 177; *Ex parte Lee*, 1 P. Wms. 782; *Ex parte Crossley*, 3 Bro. 237; *Ex parte Bloxham*, 6 Ves. 449, 600; 8 Ves. 531; 5 R. R. 358;

Fentum v. Pocock, 5 Taunt. 192; 1 Marsh. 14; *Jones v. Hibbert*, 2 Stark. 304; 19 R. R. 731; *Bank of Ireland v. Beresford*, 6 Dow, 233; 19 R. R. 50; *Ex parte Cama*, L. R. 9 Ch. App. 686; *Ex parte Newton*, 16 Ch. D. 330.

(x) Ante, REMEDIES, interest, p. 438.

(y) Ante, petitioning creditor's debt, p. 452.

(z) A joint maker of a joint and several note who has been compelled to pay, though really only a surety, is entitled to prove for interest. *Ex parte Davies*, 66 L. J., Q. B. 499.

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have been paid in full, it is to be applied in payment of interest at 4l. per cent. from the date of the receiving order on all the debts proved (a).

Trustee's
claim for
interest.

The trustees may recover interest when they are plaintiffs in an action as if no bankruptcy had happened (b).

Expenses, re-
exchange, &c.

Other expenses, such as protesting, re-exchange, posting and telegraphic messages, &c., if recoverable in an action, are proveable (c).

Where there
are several
adjudications,
under which,
and for how
much, the
holder may
prove.

Under separate adjudications of bankruptcy against different parties to a bill or note, the holder may prove the whole amount of the money due to him upon the bill or note, at the time he makes his proof, and receive dividends under each upon the sums proved, until he shall, together, have received the whole amount. "In cases of bills or notes," says Lord Hardwicke, "where there is a drawer, and, perhaps, several indorsers, suppose two of these persons become bankrupts, the owner may prove his whole debt under each commission, and is entitled to receive satisfaction out of both estates, according to the dividends to be made, and keep the bill (d) until he has received satisfaction for his whole debt; for he has a double security, and it is neither law nor equity to take it from him. But if, before the bankruptcy of one, or before the proof is tendered, he

(a) Bankruptcy Act, 1883, s. 41, sub-sect. (5). Before the 6 Geo. IV. c. 16 interest on a bill was not proveable unless payable on the face of it. *Ex parte Maslar*, 1 Atk. 150, and no interest after the act of bankruptcy could be proved at all, *Ex parte Moore*, 2 Bro. C. C. 597. But that Act, s. 57, enabled the holder to prove on overdue bills or notes down to the date of the fiat at the rate usually allowed by the Court of Queen's Bench. The 12 & 13 Vict. c. 106, s. 180, allowed interest at four per cent. down to the time of filing the petition, and the 32 & 33 Vict. c. 71, s. 36, such interest as a jury might have allowed; as to mode of calculating interest see Lindley, L.J., in *Ex parte Ador*, [1891] 2 Q. B. 574. A secured creditor may allocate his security to the claim for interest, *In re Fox and Jacobs*,

[1894] 1 Q. B. 438. As to interest in winding up, see *International Contract Co., Hughes's Claim*, L. R., 13 Eq. 623.

(b) *Pott v. Beauvan*, 7 M. & G. 604.

(c) *Anon.*, 1 Atk. 140; *Ex parte Moore*, 2 Bro. C. C. 597; *Ex parte Hoffman*, Co. Bl. 194; *Francis v. Rucker*, Ambler, 672. In the first and last of these cases, the expenses had been incurred after the act of bankruptcy and before the commission. *Prehn v. Liverpool Bank*, L. R., 5 Ex. 92; 39 L. J., Ex. 41. And see REMEDIES, re-exchange, ante, p. 445, note (b).

(d) *In re Joint Stock Disc. Co.*, L. R., 10 Eq. 11. Where proof was made on two bills the parties to which were not the same, a surplus on one can not be applied to a deficiency on the other, *James v. London & Cy. Bank*, [1899] 1 Ch. 485.

had received payment of part from the other, he could only have proved the residue under the latter bankruptcy, as the form of proving his debt shows, because no more would remain due to him" (e). And not only if any part of a bill have been received by the holder, before he have actually proved it upon the estate of a party, but even if a dividend under another commission have been merely *declared*, he can only prove for the residue (f).

Where an estate was bankrupt both in England and in a foreign country, and the holder of a bill had received a dividend in such foreign country, he was not allowed to prove again here until all the creditors had received a dividend after the foreign rate (g).

Proof against
estate bank-
rupt in more
than one
country.

Where the creditor knowingly holds the joint and separate security of partners for the same debt (h), he could not in general prove both on the joint and separate estate (i). The application of this rule to bills on which there were the names of two firms, in which firms were common partners, was involved in great uncertainty (k). Upon principle it should seem that in such cases there should be double proof. Accordingly the Act of 1883, Sched. II. par. 18, closely following similar provisions in 24 & 25 Vict. c. 134, s. 152, and 32 & 33 Vict. c. 71, s. 37, enacts that "If a debtor was at the date of the receiving order liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts against the properties respectively liable on the contracts" (l).

Proof against
joint and
separate
estate.

(e) *Ex parte Wyldman*, 1 Atk. 109; 2 Ves. sen. 113; *Ex parte Par*, 11 Ves. 65; 1 Rose, 76; 11 R. R. 149; *Ex parte Tayler*, 1 De G. & J. 112; 26 L. J., Bank. 58.

(f) *Cooper v. Pepys*, 1 Atk. 106; *Ex parte Leers*, 6 Ves. 644; *Ex parte The Royal Bank of Scotland*, 19 Ves. 310; *Ex parte Worrall*, 1 Cox. 309; see, however, *In re Gibson and Johnson*, cited 19 Ves. 311; and *Ex parte De Tastet*, 1 Rose, 16.

(g) *Ex parte Wilson*, L. R., 7 Ch. App. 490.

(h) *Ex parte Henton*, De Gex, 550.

(i) See the judgment of Lord Justice Turner in *Ex parte Goldsmith*, 25 L. J., Bank. 26. But see also *Ex parte Thornton*, 28 L. J., Bank. 4, where double proof was allowed, and it was said that the rule against it is a technical rule not to be extended.

(k) See the authorities collected in *Ex parte Goldsmid*, 25 L. J., Bank. 25; 1 De G. & J. 257.

(l) *Ex parte Honey*, L. R., 7 Ch. App. 178; 41 L. J., Bank. 9.

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Where a creditor holds bills as a collateral security.

Where a creditor proves a debt, and holds certain bills of exchange or promissory notes, as securities, if any of them be afterwards paid to him, the amount of such payment must be expunged from the proof, and the future dividends will be paid on the residue only (*m*). Where a creditor holds a bill as a security for a smaller sum than the amount of the bill, he may prove against any parties to the bill (except against the party who deposited the bill with him) for the whole amount of the bill, provided he do not receive more than twenty shillings in the pound on the debt due to him from the depositor of the bill (*n*).

Proof of bill acquired after acceptor's bankruptcy.

A holder who has bought up the notes or acceptances of the bankrupt after the bankruptcy will be admitted to prove (*o*), provided that, at the time of the bankruptcy, they were in the hands of a person entitled to prove (*p*).

Set-off in bankruptcy.

Next as to set-off and mutual credit in bankruptcy.

When the mutual credit must have existed.

Set-off in bankruptcy was first given by the 4th Anne, c. 17, s. 11, re-enacted by 5 Geo. 2, c. 30. These statutes

(*m*) *Ex parte Smith*, Cooke B. L. 175, 191; *Ex parte Barratt*, 1 Glyn & J. 327; *Ex parte Bloxham*, Cooke B. L. 176; *Ex parte Burn*, 2 Rose, 55; *Ex parte Rufford*, 1 G. & J. 41; *Ex parte Brett*, 40 L. J., Bank. 55; *In re Barned's Bank*, L. R., 10 Chan. App. 198. See further as to the mode of dealing with bills which have been deposited as a security, *Ex parte Baldwin*, 19 Ves. 230; *Ex parte Towgood*, 19 Ves. 229; *Ex parte Rushworth*, 10 Ves. 419; *Ex parte Rufford*, 1 G. & J. 41; *Ex parte Brown*, 1 G. & J. 407. This rule is confined to bills and notes, per V. Williams, L.J., *In re Blackburn*, 9 Morr. 249; the guarantee of a third party does not constitute the holder a secured creditor within sect. 168, *In re Hallett & Co.*, [1894] 2 Q. B. 256. As to proof by one partner against the estate of his co-partner for any debt in respect of the partnership, see *Ex parte Maud*, L. R., 2 Chan. App. 550. As to secured creditors in general, see s. 168 and Sched. II. rr. 9—17; and *Ex parte Jacobs*, L. R. 17

Eq. 575; *Ex parte Ashworth*, L. R. 18 Eq. 705. Money paid into Court in order to obtain leave to appear makes the bill holder a secured creditor. *Ex parte Banner*, L. R., 9 Chan. App. 379. A secured creditor in the case of a deceased insolvent or the winding up of a company can now only prove on the balance. 38 & 39 Vict. c. 77, s. 10.

(*n*) *Ex parte King*, Co. B. L. 177; *Ex parte Crossley*, 3 Bro. C. C. 237; Co. B. L. 177; *Ex parte Bloxham*, 5 Ves. 499; 5 R. R. 358; see *Ex parte Reader*, Buck, 381; *Ex parte Philips*, 1 M., D. & D. 232.

(*o*) *Ex parte Lee*, 1 P. Wms. 782; *Ex parte Atkins*, Buck, 479; *Ex parte Deey*, 2 Cov. 423; *Ex parte Brymer*, Co. B. L. 187; *Ex parte Thomas*, 1 Atk. 73; *Joseph v. Orme*, 2 N. R. 180; *Mead v. Braham*, 3 M. & Sel. 91; *Cowley v. Dunlop*, 7 T. R. 565; *Houle v. Barter*, 4 East, 177.

(*p*) *Ex parte Rogers*, Buck, 490; see *Ex parte Dickinson*, 3 D. & C. 520; *Ex parte Botten*, 1 M. & Bli. 412. See the Chapter on TRANSFER.

enact, that the mutual credit must have been before the bankruptcy ; and therefore it was decided, where a debtor to the estate claimed to set-off notes of the bankrupt, that it was for him to show that he took the notes before the act of bankruptcy (*q*). The 46 Geo. 3, c. 135, s. 3, enacted that one debt or demand might be set off against another, notwithstanding a prior act of bankruptcy, provided the credit were given to the bankrupt two months before the date of the commission, and providing the person claiming the set-off had no notice of an act of bankruptcy, or that the bankrupt was insolvent or had stopped payment. The 6 Geo. 4, c. 16, s. 50, repealed, but re-enacted by 12 & 13 Vict. c. 106, s. 171 (*r*), went still further, and allowed all debts to be set off, whether contracted before or after the act of bankruptcy, provided no notice of a specific act of bankruptcy when the credit was given could be brought home to the person claiming the benefit of such set-off. This was still further extended by the Act of 1869 (*s*), which is substantially reproduced by the provision of the Act of 1883 (*t*), enacting that where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made, and any other person proving or claiming to prove, an account shall be taken of such mutual dealings, and the balance of the account and no more shall be claimed or paid on either side respectively ; but a person shall not be entitled to set-off under this section against the property of the debtor if he had, at the time of giving credit to the debtor, notice of an available act of bankruptcy.

In case, therefore, of a country banking-house stopping payment, there does not now seem any necessary legal objection to a set-off by the debtors of a firm, of notes bought up by them in the interval between the stopping payment and the commencement of the bankruptcy. If, indeed, when the doors and windows of a bank are closed, the bankers either withdraw from the bank, or shut themselves up in it, and so avoid any communication with their creditors, they commit an act of bankruptcy by *keeping house or absenting themselves* with intent to defeat their creditors (*u*). But if, on stopping payment and closing the

(*q*) *March v. Chambers*, 2 Stra. 1234 ; *Dickson v. Evans*, 6 T. R. 57 ; 3 R. R. 119 ; *Oughterlong v. Easterby*, 4 Taunt. 888 ; *Moore v. Wright*, 6 Taunt. 517 ; 2 Marsh. 209 ; *Ex parte Ryder*, 40 L. J., Bkcy. 63 ; L. R., 6 Ch. App. 413.

(*r*) Not repealed or altered in this respect by 24 & 25 Vict. c. 134.

(*s*) 32 & 33 Vict. c. 71, s. 39.

(*t*) Sect. 38.

(*u*) *Cumming v. Bailey*, 6 Bing. 363 ; 4 Moo. & P. 36 ; 31 R. R. 438.

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bank, they are, from illness, unable to be seen, or the creditors are referred to them at their banking-house, or at their private houses, the mere circumstance of stopping payment is not an act of bankruptcy; and notes taken by a debtor to the firm, after knowledge that the firm had stopped payment, may be set off (*x*). Notice of acts of bankruptcy by some members of a banking firm, without notice of an act of bankruptcy by another member, will take away the right to set-off (*y*). But a man cannot buy up and set off notes and bills, known by him to have been given by the bankrupt for the accommodation of other persons (*z*). Where an indorser of a bill subsequently becomes the holder, the acceptor having meanwhile become bankrupt, the claim on the bill can be set off against a debt due to the acceptor's estate (*a*).

Fraudulent
set-off.

A debtor to the bankrupt's estate cannot set off a bill or note transferred to him by the real owner, even before the bankruptcy, for the mere purpose of being set off against a demand by the bankrupt's estate, so that the real owner might receive 20s. in the pound (*b*). For in such a case, the debtor is a mere trustee for others, and having no real cross demand of his own against the estate, cannot be allowed to set off another man's (*c*). But if the notes were handed over to the debtor to the estate for an antecedent debt due to him from the owners of the notes, they may be set off (*d*). Mere legal debts, without any beneficial interest in the creditor, may be set off under the general statutes of set-off, but not under the mutual credit clause. "The object of the mutual credit clause," says Parke, B., "is to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate" (*e*).

Attempt to
deprive of
set-off.

Nor can the trustees of a bankrupt deprive a man of a set-off once existing (*f*).

Mutual
credits more
compre-
hensive than
mutual debts.

We have seen that the former statutes of set-off only authorised a set-off of mutual *debts*; but the Bankrupt Acts

(*x*) *Hawkins v. Whitten*, 10 B. & C. 217; 5 Man. & R. 219; *Dickson v. Cass*, 1 B. & Ad. 343.

(*y*) *Dickson v. Cass*, 1 B. & Ad. 343; and see *Craven v. Edmondson*, 6 Bing. 734; 4 Moo. & P. 622; 31 R. R. 529.

(*z*) *Ex parte Stone*, 1 G. & J. 191.

(*a*) *Mackinnon v. Armstrong*, L. R., 2 Ap. Ca. 531.

(*b*) *Fair v. M'Ivor*, 16 East, 130; *Lackington v. Combes*, 6 Bing. N. C. 71; 8 Scott, 312.

(*c*) *Forster v. Wilson*, 12 M. & W. 191.

(*d*) *Ibid.*

(*e*) *Ibid.*

(*f*) *Edmeads v. Newman*, 1 B. & C. 418; *Bolland v. Nash*, 8 B. & C. 105; 32 R. R. 346.

have long authorised the set-off of mutual *credits*, as well as of a mutual debt. The former Act, 32 & 33 Vict. c. 71, s. 39, introduced a set-off, not only where there have been mutual debts and credits but mutual *dealings*, and this is preserved under the Act of 1883 (*g*).

It was decided in *Rose v. Hart*, that the term mutual credit is more comprehensive than the expression *mutual debts*.

In the first place, it has been held, that credit need not necessarily be of money. Therefore, where a trader, being indebted to a packer on a note of hand, sent him certain goods to pack, the trader having become bankrupt, Lord Hardwicke thought that the packer was entitled to set off against the price of the goods, not only the charge for packing, but the money due on the note (*h*). This decision, however, goes further than any other, and was qualified very soon after by the same learned Judge (*i*). The law is now taken to be, that, in order to set off goods, the property must have been deposited with an authority to turn it into money ; in other words, the mutual credit must be such as was intended to terminate in a debt (*k*). Therefore, it has been held, that where, in consideration of the bankrupt's acceptance, défendant promised to indorse a bill to the bankrupt, such promise was not a subject of mutual credit (*l*). And the mutual credit must have actually existed between the bankrupt himself and the other party (*m*).

Mutual credit need not be of money.

There may be mutual credit in bankruptcy, though one of the debts constituting it be not due ; as if it be a bond, bill, or note payable at a future day (*n*).

The debts need not be due.

(*g*) S. 38, see *Booth v. Hutchinson*, L. R., 15 Eq. 30 ; *Mersey Steel and Iron Co. v. Naylor*, 9 Q. B. D. 664. In mutual dealings, only those prior to the commencement of the bankruptcy can be considered unless the act of bankruptcy was secret, in which case the creditor's knowledge fixes the time. Cave, J., *In re Gillespie, Ex parte Reid*, 14 Q. B. D. 963 ; 54 L. J., Q. B. 342. Ante, p. 426.

(*h*) *Ex parte Deeze*, 1 Atk. 228.

(*i*) *Ex parte Ockenden*, 1 Atk. 235.

(*k*) *Glennie v. Edmunds*, 4 Taunt. 775 ; *Rose v. Hart*, 8 Taunt. 499 ; 2 Moo. 547 ; 20 R. R.

533 ; 2 Smith's L. C., 10th ed. 288 ; *Easum v. Cato*, 5 B. & Ald. 861 ; 1 Dowl. & R. 530 ; 24 R. R. 594 ; *Sampson v. Burton*, 2 B. & B. 89 ; *Russell v. Bell*, 8 M. & W. 277. A mere liability is insufficient. *Abbott v. Hicks*, 5 Bing. N. C. 578 ; *Eberle, &c. Co. v. Jonas*, 18 Q. B. D. 459 ; 56 L. J., Q. B. 278.

(*l*) *Rose v. Sims*, 1 B. & Ad. 521 ; but see *Gibson v. Bell*, 1 Bing. N. C. 743 ; 1 Scott, 712.

(*m*) *Young v. Bank of Bengal*, 1 Moore, P. C. 150. But as to this case, see *Naoroji v. Chartered Bank of India*, L. R., 3 C. P. 444.

(*n*) *Ex parte Prescott*, 1 Atk.

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An acceptance of the bankrupt's may be set off as an ingredient in mutual credit, notwithstanding that it was not due at the time of the bankruptcy, and was in the hands of an indorsee (*o*).

And where a bill is indorsed, credit may be deemed to be given to the indorser as well as to the acceptor, and therefore if the indorser become bankrupt, the indorsement may be an ingredient in mutual credit (*p*). A bill accepted for the accommodation of the bankrupt is within the mutual credit clause (*q*), and may, *under that clause*, be set off against a demand by the trustees in bankruptcy for money had and received to *their* use after the bankruptcy (*r*).

Mutual
credit need
not be
intended.

It is not necessary, to constitute mutual credit, that the parties both intended there should be mutual credit; it is sufficient though one take, by indorsement from a third party, the note or acceptance of another without his knowledge (*s*).

Breach of
trust.

But where goods or bills are deposited with a direction to turn them into money and apply the proceeds in a particular manner, if the party receiving the property is guilty of a breach of trust he cannot claim the benefit of a set-off under this section (*t*).

Effect of
notice.

When a man's private account at a bank was overdrawn, but there was a balance on a trust account which he kept there also under a different name, it was held that the

230; *Atkinson v. Elliott*, 7 T. R. 378. But the mutual credit must have existed before the bankruptcy; thus a bill drawn by the debtor and accepted by the creditor after debtor had executed a deed of assignment, but before registry thereof, cannot be set off against debtor's previous acceptance, inasmuch as at the *date of the deed* there was no mutual credit. *Ex parte Ryder*, L. R., 6 Chan. Ap. 413; 40 L. J., Bkcy. 63; *Selby v. Graves*, L. R., 3 C. P. 594.

(*o*) *Collins v. Jones*, 10 B. & C. 777; 34 R. R. 572; *Bolland v. Nash*, 8 B. & C. 105; 2 Man. & R. 189; 32 R. R. 346; *Russell v. Bell*, 8 M. & W. 277; *McKinnon v. Armstrong*, 2 App. Ca. 531.

(*p*) *Alsager v. Currie*, 12 M. &

W. 751; and see *Starey v. Burns*, 7 East, 435; see *Young v. Bank of Bengal*, 1 Moore P. C. 150.

(*q*) *Smith v. Hodson*, 4 T. R. 211; *Ex parte Bayle*, Cooke's Bk. Law, 542; *Ex parte Wagstaff*, 13 Ves. 65; *Bittleston v. Timmis*, 14 L. J., C. P. 117; 1 C. B. 389.

(*r*) *Bittleston v. Timmis*, and see *Hume v. Muggleton*, 3 M. & W. 30. The mistake in the marginal note of that case is corrected in *Bittleston v. Timmis*, *ubi supra*.

(*s*) *Hankey v. Smith*, 3 T. R. 507.

(*t*) *Key v. Flint*, 8 Taunt. 21; 1 Moo. 451; *Ex parte Flint*, 1 Swanst. 30; 18 R. R. 12; *Buchanan v. Findlay*, 9 B. & C. 738; 4 M. & Ry. 593.

banker, who had notice of the trust, could not set off the balance against the deficit (*u*).

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But mutual credit will not destroy a lien created by express contract. C. held M.'s acceptance for 24*l.*, and sent M. an article to be repaired by him. It was agreed that C. should pay M. the amount of the repairs in *ready money*. Before the repairs were completed M. became bankrupt. Held, that C. could not, by virtue of his cross demand on the acceptance, sue M.'s assignees in trover for the article before paying the amount of the repairs (*x*).

Mutual credit does not extinguish a lien.

Set-off in bankruptcy may be either in an action at law, or before the Court of Bankruptcy.

Set-off, &c. in bankruptcy, how available.

A set-off under the Bankruptcy Act is available in all actions, whether for debt or damages. No plea or notice was formerly necessary, though it was usual to plead or give notice as under the general statutes. But by Rule 8, T. T. 1853, re-enacting R. H. 4 Will. 4, mutual credit must be pleaded. Where the assignees or trustees affirm the bankrupt's dealings, they let in his set-off (*y*). An assignment under the old Insolvent Debtors Act had no relation back to the commencement of the imprisonment, and therefore the assignees having declared on a sale by the insolvent, after the imprisonment, and before the assignment, not on a sale by themselves, were subject to the defendant's set-off against the insolvent (*z*).

To an action for a debt due to the assignees in their official character, the defendant cannot plead a set-off due from the bankrupt before his bankruptcy (*a*). But such a set-off may be the subject of mutual credit (*b*). A garnishee could not set off a debt due to him from the judgment creditor (*c*).

But where, there being no bankruptcy, a company in process of winding up held acceptances of S., not yet due, but S., the acceptor, held bills drawn and indorsed by the company, which bills, the drawees having refused acceptance, had therefore become a present debt due from the company to S. ; it was held on appeal that the official liquidator of

Mutual credit under the Companies Acts.

(*u*) *In re Gross*, L. R., 6 Ch. App. 632. Ante, p. 31, note (*w*).

(*x*) *Clarke v. Fell*, 4 B. & Ad. 404; 1 Nev. & Man. 244; *Ex parte Bennett*, 9 Ch. Ap. 293.

(*y*) *Smith v. Hodson*, 4 T. R. 211.

(*z*) *Sims v. Simpson*, 1 Bing.

N. C. 306.

(*a*) *Groom v. Mealey*, 2 Bing. N. C. 138; 2 Scott, 171; *Wood v. Smith*, 4 M. & W. 523.

(*b*) See *Bittleston v. Timmis*, 14 L. J., C. P. 117; 1 C. B. 389.

(*c*) *Sampson v. L. & S. W. Railway*, L. R., 10 Q. B. 28.

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PERTY IS
DIVISIBLE
AMONG
CREDITORS.

the company had a right to negotiate the acceptances of S., because there was no mutual credit, the case not then being within the provisions of the Bankruptcy Act (*d*).

We may now consider what property is divisible in satisfaction of the claims proved upon the estate, so far as material to this work. And for this purpose it will be sufficient to note that from the general rule (*e*) rendering divisible all the property belonging to or vested in the bankrupt at the commencement of or during the bankruptcy, is excepted property held by him on trust for any other person (*f*). And further, that to such property as so belongs to or is vested in the bankrupt, are to be added all goods falling within the reputed ownership clause (*g*).

TRUST PRO-
PERTY EX-
CEPTED.

And first as to property held on trust, where goods are specifically appropriated prior to the bankruptcy, for the purpose of meeting bills of exchange, the holder of the bill has been held entitled as against the creditors to the benefit of the above exception, since as to such goods the bankrupt is in effect a trustee merely for the person entitled to receive the contents of the bill (*h*).

DEPOSITED
SECURITIES.

Holder's right
to the benefit
of security in
the event of
bankruptcy.

When and to what extent securities or remittances in the hands of an acceptor, who afterwards becomes bankrupt, are available in favour of the holder of the bill, is a question involving many difficulties, and it has accordingly given occasion to much discussion.

These questions can seldom arise, except when both drawer and acceptor are insolvent, for it is a matter of indifference to the bill holder from what parties or funds he receives payment (*i*).

(*d*) *In re Commercial Bank of India*, L. R. 1 Ch. App. 538; see *In re Agra and Masterman's Bank*, L. R., 3 Eq. 337; *Ex parte Price, Re Lankester*, L. R., 10 Ch. 648. Though the Jud. Act, 1875, s. 10, introduced into winding up the same rights as to set-off and mutual credits and dealings as in bankruptcy, still a debt cannot be set off against calls, *In re Auriferous Prop. Co.*, [1898] 1 Ch. 691; nor a judgment debt, *Gills' case*, 12 Ch. D. 755; and see *Washington Diamond Co., In re*, [1893] 3 Ch. 95. Mutual dealings must result in specific money claims, *Eberle Hotels Case*, 18 Q. B. D. 459.

(*e*) Bankruptcy Act, 1883, s. 44 (*i*).

(*f*) *Id.* (1), and see ante, p. 455, note (*d*).

(*g*) *Id.* (iii).

(*h*) *Ex parte Imbert*, 26 L. J., Bkcy. 65; *Ex parte Flower*, 4 Dea. & C. 449; see also *Lutcher v. Comptoir d'Escompte de Paris*, 1 Q. B. D. 709; *Ranken v. Alfaro*, 46 L. J., Ch. 832; 5 Ch. D. 786; *Kinnaird v. Webster*, 48 L. J., Ch. 348; 10 Ch. D. 139; *In re Broad*, 13 Q. B. D. 740; *Ex parte Derer*, *Id.* 766; *Phelps v. Cumber*, 29 Ch. D. 813; *Brown Shipley v. Kough*, *Id.* 848, as to what is a sufficient appropriation.

(*i*) The original and leading

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The general rule of law, seems to be, that when both the drawer and the acceptor of a bill become bankrupt, and bills, securities or funds have been remitted by the drawer to the acceptor, and specifically appropriated to cover the acceptor's liability on his acceptance, the holder of the bill may avail himself of them ; they do not belong to the acceptor's general creditors, and do not pass to his trustee in bankruptcy.

Holder's right to securities deposited with acceptor.

Although this principle applies most frequently in the case of actual bankruptcy, yet it is not essential to his application that the insolvency should have been judicially ascertained by an adjudication in bankruptcy. It is enough if the parties are practically insolvent (*k*). The securities need not be deposited by a party to the bill ; it will suffice if the depositor be liable in respect of the transaction for which the bill was drawn (*l*). To fall within this rule the holder must be entitled to prove against both the insolvent estates ; where therefore the bill had been dishonoured for non-acceptance it was held not to come within it (*m*).

Where the customer of a banker had lodged a sum of money with a bank to meet an acceptance, and the acceptor failed before its maturity, it was held that at law the drawer could not maintain an action against the banker, there having been no privity of contract between him and the banker (*n*). And in a similar case (*o*) the Vice-Chancellor

Holder's right to funds deposited with a third person.

case on the subject is *Ex parte Waring*, 19 Ves. 345 ; 13 R. R. 217 : the complicated facts of that case, so far as they are material to the question now under consideration, are clearly stated by Lord Romilly, M.R., in *Re New Zealand Banking Company*, L. R., 4 Eq. 226 ; it seems that the balance must be in favour of the drawer. See also *In re Suse*, No. 2 ; 14 Q. B. D. 611 ; 54 L. J., Q. B. 390.

(*k*) *Powles v. Hargreaves*, 3 De G., M. & G. 430 ; *Bank of Ireland v. Perry*, L. R., 7 Ex. 14 ; 41 L. J., Ex. 9 ; *City Bank v. Luckie*, L. R., 5 Ch. Ap. 773 ; *In re Barned's Bank*, L. R., 10 Ch. Ap. 198. But the estate of the remitter must still be within the jurisdiction of the Court. *In re Yglesias*, L. R., 10 Ch. Ap. 635 ; 45 L. J., Bkcy. 54. And as to the doctrine laid down in *Powles v. Hargreaves*, ubi sup., see now *Royal Bank of Scotland*

v. Commercial Bank of Scotland, 7 App. Ca. 366.

(*l*) *Ex parte Smart*, L. R., 8 Ch. Ap. 220.

(*m*) *Vaughan v. Halliday*, L. R., 9 Ch. Ap. 561. The funds or monies claimed for the benefit of the bill holders must not be absolutely and entirely the property of, and in the possession of, one of the parties only. *Ex parte Lambton*, L. R., 10 Ch. Ap. 405 ; *Ex parte Banner*, L. R., 2 Ch. D. 278.

(*n*) *Moore v. Bushell*, L. J. 27 Exch. 3. See *Farley v. Turner*, 26 L. J., Chan. 710.

(*o*) *Hill v. Royds*, L. R., 8 Eq. 290. The funds must be specifically appropriated to that purpose, and no mere statement of the drawer can create any lien on funds in the drawee's hands. *Thompson v. Simpson*, L. R., 5 Ch. Ap. 659 ; 39 L. J., Ch. 857 ; *Louisiana Bank v. Bank of New*

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followed the law, and held there was no equity in favour of the drawer. An acceptor who has deposited money with a bank to meet a bill, on the bank's failure has only the rights of an ordinary creditor (*p*); and where funds were remitted to a bank to meet an acceptance, the banker was held to be entitled to retain them for a debt due to him from the sender (*q*).

Holder's
right to
acceptor's
guarantee.

The acceptor's right to the benefit of a guarantee given to him is not transferred to a holder of the bill (*r*), unless the guarantee be given for the purpose of being exhibited to other parties (*s*).

REPUTED
OWNERSHIP.

Next as to the reputed ownership clause (*t*).

Dormant
partner's
share not
within.

The share of a dormant partner did not pass to the trustee in bankruptcy under this clause (*u*). But the claim of a lender, who is to have a share of the profits, and who

Orleans, L. R., 6 H. of L. 352. In *Ranken v. Alfaro*, 5 Ch. D. 786, the statement was made both to holder and drawee.

(*p*) *Massey's case*, 39 L. J., Ch. 635.

(*q*) *Johnson v. Roberts*, L. R., 10 Ch. Ap. 505.

(*r*) *Ex parte Stephens*, L. R., 3 Ch. Ap. 753.

(*s*) *In re Agra and Masterman's Bank*, L. R., 2 Ch. Ap. 391. In *Hallett's case*, [1894] 2 Q. B. 256, the guarantee of the maker's solvency ran in favour of payee or holder.

(*t*) The Bankruptcy Act of 1883, s. 44 (iii), provides that the property divisible shall comprise "all goods being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof: provided that things in action, other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods" within that section. The Bankrupt Act (12 & 13 Vict. c. 106),

s. 125, following the series of Acts from the time of James I., enacted that, if at the time of the bankruptcy the bankrupt had, by the consent of the true owner, in his possession, order or disposition, any goods whereof he was the reputed owner, the Court should have power to order them to be sold for his creditors. The necessity for an order, introduced by this section, was discontinued in the Act of 1869 (32 & 33 Vict. c. 71), s. 15, which repealed all the former provisions on the subject; but it confined the doctrine of reputed ownership to bankrupts being traders. And whereas sect. 125 of the Act of 1849 (12 & 13 Vict. c. 106), applied not only to things in possession, but to things in action, as bonds, policies and other debts (*Ryall v. Rolle*, 1 Ves. sen. 348; 1 Atk. 164), the Act of 1869 took out of the operation of the reputed ownership clause all things in action, except debts due to the bankrupt in the course of his trade, in which respect it is followed by the above quoted clause of the Act of 1883.

(*u*) *Reynolds v. Rowley*, L. R., 2 Q. B. 474; 36 L. J., Q. B. 247.

would formerly have been deemed a dormant partner, was postponed to the claims of other creditors by 28 & 29 Vict. c. 86, s. 5 (now repealed, but re-enacted in Partnership Act, 1890, s. 3), should the debtor become bankrupt or die in insolvent circumstances (x).

Where a creditor assigns a trade debt, and then becomes bankrupt, the general rule is that the debt so assigned passes nevertheless to the trustee in bankruptcy, as being in the order and disposition of the bankrupt with the consent of the true owner, unless the debtor have had notice of the assignment. It is, however, sufficient if the assignee of the debt do all he can to give notice or despatch a notice before the bankruptcy, though it be not received by the debtor till after the bankruptcy (y). It has been held that a debt, in order to pass under the reputed ownership clause, must have been *unconscientiously* allowed to remain in the disposition of the bankrupt (z).

Assigned
debts, when
within.

The debtor's knowledge of the assignment is not necessary where a negotiable bill or note is indorsed or transferred, for the legal title to the debt is conveyed by the indorsement or delivery. But if a trader, who afterwards becomes bankrupt, indorses a bill or note not negotiable, unless the debtor have had notice, the bill or note passes to the bankrupt's trustee by reputed ownership (a).

Bills or notes may pass to the trustee of a bankrupt under the clause of reputed ownership. A person having three bills of exchange, applied to a country banker with whom he had had no previous dealings, to give for them a bill on London for the same amount; and the bill given by the banker was afterwards dishonoured:—Held, that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange; and that *if the exchange had not been complete*, still that, the banker having become a bankrupt, and the three bills having come to the

Bills and notes
within it.

(x) *In re Ramsden*, 40 L. J., Bkcy. 89.

(y) *Belcher v. Bellamy*, 17 L. J., Exch. 219; 2 Exch. 303. See *Brewin v. Short*, 5 E. & B. 227; 24 L. J., Q. B. 297.

(z) See *Joy v. Campbell*, 1 Sch. & Lef. 336; 9 R. R. 39; and *Load v. Green*, 15 M. & W. 216; *Hamilton v. Bell*, 10 Exch. 545. Where the creditor had

assigned a debt, and drew on the debtor for the amount, but the assignee neither presented the draft nor gave notice of the assignment, the debt remained within the order and disposition of the creditor on his bankruptcy, *Ex parte Goetz*, [1898] 1 Q. B. 787.

(a) *Belcher v. Campbell*, 8 Q. B. 1.

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possession of his assignees, *must be considered as goods and chattels in the order and disposition of the bankrupt at the time of the bankruptcy, within the meaning of the Bankrupt Act.* "These bills," says Abbot, C.J., "being negotiable securities, of which the bankrupts might dispose, and having remained in their possession till the time of the bankruptcy, and so come to their assignees, are, in my opinion, within the operation of the statute. It has been held that *debts* are within the statute ; if so, *à fortiori*, bills of exchange must be " (b).

But a bill or note in the hands of an agent for a specific purpose does not pass to his trustees by reputed ownership (c).

Bills in the hands of an agent, factor, or banker becoming bankrupt, not within it.

Bills remitted to an agent as a factor or banker, and entered short while unpaid, or paid in generally, for the amount to be received (d) by such banker, or for any other specific purpose (e), and not discounted or treated as cash, are considered as still in the possession of the principal ; and, therefore, in case of the bankruptcy of such agent, banker, or factor, they do not pass to his trustee, but must be returned to the principal, subject to such lien as the agent may have upon them. "Every man," says Lord Ellenborough, "who pays bills not due into the hands of his banker, places them there, as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill, or advance money upon the credit of it, that alters the case ; he then acquires the entire property in it, or has a lien on it, *pro tanto*, for his advance" (f).

(b) *Hornblower v. Proud*, 2 B. & Ald. 327 ; 20 R. R. 456. See *Bryson v. Wylie*, 1 B. & P. 83, n. As to accommodation bills in the hands of the party for whose accommodation they were accepted, see *Wallace v. Hardacre*, 1 Camp. 46 ; 10 R. R. 629.

(c) *Bruce v. Hurly*, 1 Stark. 23 ; *Belcher v. Campbell*, 8 Q. B. 1. See *Took v. Hollingworth*, 5 T. R. 215 ; 2 R. R. 573.

(d) See *Jombart v. Woollett*, 2 M. & C. 389 ; *Ex parte Edwards*, 11 L. J., Bank. 36.

(e) *Belcher v. Campbell*, 8 Q. B. 11.

(f) *Giles v. Perkins*, 9 East, 12. See *Ex parte Dumas*, 1 Atk. 232 ; 2 Ves. sen. 582 ; *Zinck v. Waller*, 2 W. Bl. 1154 ; *Bolton v.*

Puller, 1 B. & P. 539 ; 4 R. R. 723 ; *Ex parte Sargeant*, 1 Rose, 153 ; *Ex parte Sollers*, 18 Ves. 229, S. P. ; *Ex parte Pease*, 1 Rose, 232 ; *Ex parte Wakefield Bank*, 1 Rose, 242 ; *Carstairs v. Bates*, 3 Camp. 301 ; *Ex parte M'Gae*, 2 Rose, 376 ; *Ex parte The Leeds Bank*, 1 Rose, 254 ; 19 Ves. 25 ; *Ex parte Rowton*, 17 Ves. 426 ; 1 Rose, 15 ; *Ex parte Buchanan*, 1 Rose, 280 ; 2 Rose, 162 ; *Ex parte Waring*, 2 Rose, 182 ; 13 R. R. 217, Sums retained by a banker to meet acceptances, the marginal notes for which given by the banker had been transferred, are not within order and disposition of customer if bankrupt. *Ex parte Kemp*, L. R., 9 Ch. Ap. 383.

Dawson & Isle [1904] 1 Ch. 623.

And the law is the same though the amount of the bills be entered by the banker in the cash column of the ledger and pass-book, and though the banker pay them away or discount them at his discretion.

A customer was in the habit of indorsing and paying into his banker's hands bills not due, which, if approved, were immediately entered as bills to his credit, to the full amount; and he was then at liberty to draw for that amount by cheques on the bank. The customer was charged with interest upon all cash payments to him, from the time when made, and upon all payments by bills from the time when they were due and paid, and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupt, it was held, that the customer might maintain trover against their assignees for bills paid in by him, and remaining *in specie* in their hands, the cash balance, independently of the bills, being in the favour of the customer at the time of the bankruptcy; Bayley, J., observing, "It has been argued for the defendants, that we must infer an agreement to have been made between the banker and his customer, that, as soon as bills reached the hands of the banker, the property should be changed. Undoubtedly, if there were any such bargain, the defendants would be entitled to our judgment; but if there be no such bargain, then the case of customer and banker resembles that of principal and factor; and the bills, remaining in the banker's hands *in specie*, will, notwithstanding the bankruptcy of the banker, continue the property of the customer." Though the amount of the bills was carried into the cash column, it does not follow that the customer consented to their being considered as cash (*g*). The trustee may be restrained by injunction from negotiating the bills (*h*).

As to the position of the bankrupt prior to discharge, certain points have been before the Courts.

POSITION OF
BANKRUPT
PRIOR TO
DISCHARGE.

(*g*) *Thompson v. Giles*, 2 B. & C. 422; 3 Dowl. & R. 733; 26 R. R. 392; *Ex parte Barkworth*, 27 L. J., Bkcy. 5. In *Ex parte Stannard*, 10 Morr. 193, Vaughan Williams, J., held that the decision in *Thompson v. Giles* was largely grounded on the fact that the bills

were handed to the banker before due, or "short," as it is termed; but in *Gaden's case*, Priv. Coun., Feb. 23, [1899], the same was held of a cheque which must be payable on demand.

(*h*) *Ex parte Jombert*, Cor. V.-C., Dec. 1836.

/A. C. 281.

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Transfer, in case of bankruptcy of holder.

If the holder of a bill of exchange, in which he has a beneficial interest, becomes bankrupt, the property in the bill vests, from the time of the act of bankruptcy, in his trustee; and under the earlier Acts it was held that the assignees must indorse (*i*).

Where the bankrupt is a trustee.

But as, in general, property, in which a bankrupt has no *beneficial interest*, does not pass to his trustees, he may, after an act of bankruptcy, indorse a bill accepted for his accommodation, so as to convey to his indorsee a right of action against the accommodation acceptor (*k*).

When the transfer of a bill by a debtor approaching bankruptcy is valid.

The distinction (*l*) between a payment in money and a payment or satisfaction by bills, is, at this day, of less moment, since now, not only payments, but all contracts, dealings and transactions with a bankrupt prior to receiving order, and without notice of an act of bankruptcy available for adjudication, are protected (*m*).

Transfer to a bankrupt.

Where a negotiable instrument is given to the bankrupt after his bankruptcy, the bankrupt has the property in it, unless the trustees choose to interfere (*n*). Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid as against the trustee (*o*).

When his capacity admitted.

If a man already a bankrupt be payee of a negotiable bill or note, the acceptor or maker cannot dispute the payee's capacity to indorse (*p*).

EFFECT OF
DISCHARGE.

The order of discharge releases the bankrupt from all debts provable in bankruptcy except recognizances, crown

(*i*) *Pinkerton v. Marshall*, 2 H. B. 335; *Thomason v. Frere*, 10 East, 418; 10 R. R. 341.

(*k*) *Arden v. Watkins*, 3 East, 317; *Wallace v. Hardacre*, 1 Camp. 45; 10 R. R. 629; *Ramsbottom v. Cator*, 1 Stark. 228.

(*l*) *Hawkins v. Penfold*, 2 Ves. sen. 550; *Wilkins v. Casey*, 7 T. R. 711; 4 R. R. 558; *Bayly v. Schofield*, 1 M. & Sel. 338; see *Bishop v. Crawshaw*, 3 B. & C. 415; 5 Dowl. & R. 279.

(*m*) See ante, PROTECTED DEALINGS, p. 457.

(*n*) *Drayton v. Dale*, 2 B. & C.

293; 3 Dowl. & R. 534; 26 R. R. 356; *Herbert v. Sayer*, 5 Q. B. 965; 13 L. J., Q. B. 209. *In re Pettit*, 1 Ch. D. 478.

(*o*) *Cohen v. Mitchell*, 25 Q. B. D. 267. But when the bill discounted by the bankrupt was really acquired before, the trustee can follow the proceeds. *In re Rogers*, 8 Morr. 236.

(*p*) *Drayton v. Dale*, 2 B. & C. 293; 26 R. R. 356; *Pitt v. Chappelow*, 8 M. & W. 616; *Braithwaite v. Gardiner*, 8 Q. B. 473. Code, s. 54 (1). See the Chapter on ACCEPTANCE.

debts, and liabilities for revenue offences or on bail bonds in prosecutions for such offences (in which excepted cases the written consent of the Treasury to his discharge is required), nor will the discharge release him from liability incurred by means of any fraud or fraudulent breach of trust *to which he was a party* (q). Nor, again, will the order release any person who at the date of the receiving order was partner or co-trustee with the bankrupt or jointly bound with him or surety for him (r).

Under the Act of 1869 and Rules of 1870 it was held that bills held by a banker "pending discount," i.e., during inquiries as to the solvency of the acceptors, the banker meanwhile making some advances to the customer on the credit of the bills, were not securities which the banker was bound to value in proving under the bankruptcy of the customer (s). But as to voting, it is expressly provided by the Act now in force (t) that no creditor under such circumstances shall be entitled to vote unless he is willing for the purpose of voting, but not for the purposes of dividend, to estimate and deduct the value of the security from his proof.

Valuation of securities for purpose of voting.

(q) 46 & 47 Vict. c. 52, s. 30 (1), (2). The words in italics were not in sect. 49 of the Act of 1869. See *Cooper v. Prichard*, 11 Q. B. D. 351. As to bills accepted in blank before bankruptcy and filled up after discharge, see *Temple v. Pullen*, 8 Exch. 389; 22 L. J., Ex. 151; *Aude v. Dixon*, 6 Exch. 869; *L. & S. W. Bank v. Whitworth*,

5 Exch. D. 96; *Ex parte Bartlett*, 3 De G. & J. 378.

(r) Ibid. (3).

(s) *Ex parte Schofield, Re Firth*, L. R., 12 Ch. D. 337. In Form 72, Bank. R. 1886-1890, the bills must be specified. See *Ex parte Kidd*, 5 Mans. 227.

(t) Bankruptcy Act, 1883, sch. 1, r. 11.

APPENDIX.

STATUTES.

[55 Geo. 3, c. 184, s. 23.]

An Act for repealing the Stamp Duties on Deeds, Law Proceedings, and other written or printed Instruments, and the Duties on Fire Insurances, and on Legacies and Successions to Personal Estate upon Intestacies, now payable in Great Britain, and for granting other Duties in lieu thereof.

XXIII. And be it further enacted, that from and after the thirty-first day of August, one thousand eight hundred and fifteen, it shall be lawful for the governor and company of the Bank of Scotland, and the Royal Bank of Scotland, and the British Linen Company in Scotland, respectively, to issue their promissory notes for the sums of one pound, one guinea, two pounds, and two guineas, payable to the bearer on demand, on unstamped paper, in the same manner as they were authorized to do by the aforesaid act of the forty-eighth year of his Majesty's reign; they the said governor and company of the Bank of Scotland, and the Royal Bank of Scotland, and the British Linen Company, respectively, giving such security, and keeping and producing true accounts of all the notes so to be issued by them respectively, and accounting for and paying the several duties payable in respect of such notes, in such and the same manner, in all respects, as is and are prescribed and required by the said last-mentioned act with regard to the notes thereby allowed to be issued by them on unstamped paper, and also to re-issue such promissory notes respectively, from time to time, after the payment thereof, as often as they shall think fit (a).

55 Geo. 3,
c. 184.

The Bank and Royal Bank of Scotland, and British Linen Company, may issue small notes on unstamped paper, accounting for duties.

(a) Repealed, S. L. Rev. Act, 1874. Fractions of a pound sterling have been prohibited since 8 & 9 Vict. c. 38, s. 5, which Act also by sect. 13 otherwise practically confirms the above

privileges, and by sect. 15 makes Bank of England notes not a legal tender in Scotland, as is also the case in Ireland, 8 & 9 Vict. c. 37, s. 6.

[9 Geo. 4, c. 14, ss. 1, 3, 4, 5, 8.]

An Act for rendering a written Memorandum necessary to the Validity of certain Promises and Engagements.

9 Geo. 4, c. 14.

English Act,
21 Jac. 1, c. 16.

Irish Act,
10 Car. 1, sess.
2, c. 6.

In actions of
debt or upon
the case, no
acknowledg-
ment shall be
deemed suffi-
cient, unless
it be in
writing or by
part pay-
ment.

Joint con-
tractors.

Proviso for
the case of
joint con-
tractors.

“Whereas, by an act passed in England, in the twenty-first year of the reign of King James the First, it was, among other things, enacted, that all actions of account and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, should be commenced within three years after the end of the then present session of parliament, or within six years next after the cause of such actions or suit, and not after: and whereas a similar enactment is contained in an act passed in Ireland, in the tenth year of the reign of King Charles the First; and whereas various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments; and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments; and to the intention thereof:” be it therefore enacted by the king’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That, in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever; provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear, at the trial or otherwise, that the plaintiff though barred by either of the said recited acts or this act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed

for the plaintiff as to such defendant or defendants against whom he shall recover, or for the other defendant or defendants, against the plaintiff. 9 Geo. 4, c. 14.

III. And be it further enacted, that no indorsement or memorandum of any payment, written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes. Indorsements of payment.

IV. And be it further enacted, that the said recited acts, and this act, shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice or otherwise. Simple contract debts alleged by way of set-off.

V. And be it further enacted, that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. (Repealed S. L. Rev. 1875, cf. 37 & 38 Vict. c. 62, s. 2.) Confirmation of promises made by infants.

VIII. And be it further enacted, that no memorandum or agreement made necessary by this act, shall be deemed an agreement within the meaning of any statute relating to the duties of stamps. Exempted from stamps.

[7 & 8 Vict. c. 32.]

An Act to regulate the Issue of Bank Notes, and for giving to the Governor and Company of the Bank of England certain Privileges for a limited Period. [19th July, 1844.]

IV. And be it enacted that, from and after the thirty-first day of August, one thousand eight hundred and forty-four, all persons shall be entitled to demand, from the Issue Department of the Bank of England, Bank of England notes in exchange for gold bullion at the rate of three pounds seventeen shillings and ninepence per ounce of standard gold: provided always, that the said governor and company shall in all cases be entitled to require such gold bullion to be melted and assayed by persons approved by the said governor and company at the expense of the parties tendering such gold bullion. 7 & 8 Vict. c. 32. All persons may demand of the issue department notes for gold bullion.

X. And be it enacted, that, from and after the passing of this act, no person other than a banker who, on the sixth day of May, one thousand eight hundred and forty-four, was lawfully No new bank of issue.

7 & 8 Vict.
c. 32.

Restriction
against issue
of bank
notes.

issuing his own bank notes, shall make or issue bank notes in any part of the United Kingdom.

XI. And be it enacted, that from and after the passing of this act it shall not be lawful for any banker to draw, accept, make or issue, in England or Wales, any bill of exchange or promissory note or engagement for the payment of money payable to bearer on demand, or to borrow, owe, or take up, in England or Wales, any sums or sum of money on the bills or notes of such banker payable to bearer on demand, save and except that it shall be lawful for any banker who was on the sixth day of May, one thousand eight hundred and forty-four, carrying on the business of a banker in England or Wales, and was then lawfully issuing, in England or Wales, his own bank notes, under the authority of a licence to that effect, to continue to issue such notes to the extent and under the conditions hereinafter mentioned, but not further or otherwise; and the right of any company or partnership to continue to issue such notes shall not be in any manner prejudiced or affected by any change which may hereafter take place in the personal composition of such company or partnership, either by the transfer of any shares or share therein, or by the admission of any new partner or member thereto, or by the retirement of any present partner or member therefrom: provided always, that it shall not be lawful for any company or partnership now consisting of only six or less than six persons to issue bank notes at any time after the number of partners therein shall exceed six in the whole.

Bankers
ceasing to
issue notes
may not
resume.

XII. And be it enacted, that if any banker, in any part of the United Kingdom, who after the passing of this act shall be entitled to issue bank notes shall become bankrupt, or shall cease to carry on the business of a banker, or shall discontinue the issue of bank notes, either by agreement with the governor and company of the Bank of England or otherwise, it shall not be lawful for such banker at any time thereafter to issue any such notes.

Banks within
sixty-five
miles of
London may
accept, &c.,
bills.

XXVI. And be it enacted, that from and after the passing of this act, it shall be lawful for any society or company or any persons in partnership, though exceeding six in number, carrying on the business of banking in London, or within sixty-five miles thereof, to draw, accept or indorse bills of exchange, not being payable to bearer on demand, anything in the hereinbefore recited act passed in the fourth year of the reign of his said Majesty King William the Fourth, or in any other act, to the contrary notwithstanding.

[16 & 17 Vict. c. 59.]

An Act to repeal certain Stamp Duties, and to grant others in lieu thereof, to amend the Laws relating to Stamp Duties, and to make perpetual certain Stamp Duties in Ireland.

[4th August, 1853.]

XIX. Provided always, that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof. (See Chancery Funds Act, 1872, s. 11, and Code, s. 60.)

See p. 31. & Capital & Counties Bank v. Gordon [1903] A.C. 240

16 & 17 Vict.
c. 59.

Drafts on bankers payable to order on demand sufficient authority for payment without proof of indorsement.

[17 & 18 Vict. c. 83.]

An Act to amend the Laws relating to the Stamp Duties.

[10th August, 1854.]

XI. And whereas an act was passed in the seventh and eighth years of her Majesty's reign, chapter thirty-two, to regulate the issue of bank notes; and an act was passed in the eighth and ninth years of her Majesty's reign, chapter thirty-eight, to regulate the issue of bank notes in Scotland; and another act was passed in the last-mentioned years chapter thirty-seven, to regulate the issue of bank notes in Ireland; and in order to prevent evasions of the regulations and provisions of the said respective acts it is expedient to define what shall be deemed to be bank notes within the meaning thereof respectively: Be it enacted, that all bills, drafts or notes (other than notes of the Bank of England), which shall be issued by any banker, or the agent of any banker, for the payment of money to the bearer on demand, and all bills, drafts or notes so issued, which shall entitle or be intended to entitle the bearer or holder thereof, without indorsement, or without any further or other indorsement than may be thereon at the time of the issuing thereof, to the payment of any sum of money on demand, whether the same shall be so expressed or not, in whatever form and by whomsoever such bills, drafts or notes shall be drawn or made, shall be deemed to be bank notes of the banker by whom or by whose agent the same shall be issued within the meaning of the said three several acts last mentioned, and within all the clauses, provisions and regulations thereof respectively.

17 & 18 Vict.
c. 83.

What shall be deemed bank notes within the meanings of 7 & 8 Vict c. 32, and 8 & 9 Vict. cc. 38 and 37.

17 & 18 Vict.
c. 83.

All bills,
drafts, and
notes deemed
bank notes
under the
above-recited
acts liable to
stamp duties,
&c.

XII. All bills, drafts and notes, which by or under this act, or the said three several acts last mentioned, or any of them respectively, are declared or deemed to be bank notes, shall be subject and liable to the stamp duties, and composition for stamp duties imposed by or payable under any act or acts in force upon or in respect of promissory notes for the payment of money to the bearer on demand; and all clauses, provisions, regulations, penalties and forfeitures contained in any act or acts relating to the issuing of any such promissory notes, or for securing the said stamp duties and composition respectively, or for preventing or punishing frauds or evasions in relation thereto, shall respectively be deemed to apply to all such bills, drafts and notes as aforesaid, and to the stamp duties and composition payable upon or in respect thereof, anything in this act, or any other act or acts, to the contrary notwithstanding.

[19 & 20 Vict. c. 97.]

*An Act to amend the Laws of England and Ireland affecting
Trade and Commerce.* [29th July, 1856.]

19 & 20 Vict.
c. 97.

Consideration
for guarantee
need not
appear by
writing.

III. No special promise to be made by any person after the passing of this act to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

A surety who
discharges the
liability to be
entitled to
assignment of
all securities
held by the
creditor.

V. Every person who being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or co-debtor

shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable.

19 & 20 Vict.
c. 97.

VIII. In relation to the rights and remedies of persons having claims for repairs done to, or supplies furnished to or for, ships, every port within the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed a home port.

With reference to the repairs of ships, every port within the United Kingdom, &c. a home port.

IX. All actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandize between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen, then within six years after the passing of this act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

Limitation of actions for "merchants' accounts."

X. No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the act of the twenty-first year of the reign of King James the First, chapter sixteen, section three, or by the act of the fourth year of the reign of Queen Anne, chapter sixteen, section seventeen, or by the act of the fifty-third year of the reign of King George the Third, chapter one hundred and twenty-seven, section five, or by the acts of the third and fourth years of the reign of King William the Fourth, chapter twenty-seven, sections forty, forty-one, and forty-two, and chapter forty-two, section three, or by the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty, shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which, by virtue of any of the aforesaid enactments, imprisonment is now a disability, by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued.

Absence beyond seas or imprisonment of a creditor not to be a disability.

XI. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid or any of them lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time of such cause of action or suit

Period of limitation to run as to joint debtors in the kingdom, though some are beyond seas.

19 & 20 Vict.
c. 97.

Judgment recovered against joint debtors in the kingdom to be no bar to proceedings against others beyond seas after their return.

Definition of "beyond seas," within 4 & 5 Anne, c. 36, and this act.

Provisions of 9 Geo. 4, c. 14, ss. 1 and 8, and 16 & 17 Vict. c. 113, ss. 24 and 27, extended to acknowledgments by agents.

Part payment by one contractor, &c., not to prevent bar by certain statutes of limitations in favour of another contractor, &c.

accrued, by reason only that some other one or more of such joint debtors was or were at the time of such cause of action accrued beyond the seas, and such person or persons so entitled as aforesaid, shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time of the cause of action or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid.

XII. No part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them being part of the dominions of her Majesty, shall be deemed to be beyond seas within the meaning of the act of the fourth and fifth years of the reign of Queen Anne, chapter sixteen or of this act.

XIII. In reference to the provisions of the acts of the ninth year of the reign of King George the Fourth, chapter fourteen, sections one and eight, and the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

XIV. In reference to the provisions of the acts of the twenty-first year of the reign of King James the First, chapter sixteen, section three, and of the act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section three, and of the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteenth, section twenty, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

[25 & 26 Vict. c. 89.]

An Act for the Incorporation, Regulation and Winding up of Trading Companies and other Associations.

[7th August, 1862.]

47. A promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company under this act, if made, accepted, or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or indorsed by or on behalf or on account of the company by any person acting under the authority of the company.

25 & 26 Vict.
c. 89.

[32 & 33 Vict. c. 46.]

An Act to abolish the Distinction as to Priority of Payment which now exists between the Specialty and Simple Contract Debts of deceased Persons. [2nd August, 1869.]

1. In the administration of the estate of every person who shall die on or after the first day of January, one thousand eight hundred and seventy, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: Provided always, that this act shall not prejudice or affect any lien, charge or other security which any creditor may hold or be entitled to for the payment of his debt.

32 & 33 Vict.
c. 46.

All specialty and simple contract debts of deceased persons to stand in equal degree after 1st Jan. 1870.

[32 & 33 Vict. c. 62.]

An Act for the Abolition of Imprisonment for Debt, for the Punishment of Fraudulent Debtors, and for other Purposes.

[9th August, 1869.]

4. With the exceptions hereinafter mentioned, no person shall, after the commencement of this act, be arrested or imprisoned for making default in payment of a sum of money.

32 & 33 Vict.
c. 62.

There shall be excepted from the operation of the above enactment:

Abolition of imprisonment for debt, with exceptions.

1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract:

32 & 33 Vict.
c. 62.

2. Default in payment of any sum recoverable summarily before a justice or justices of the peace :
3. Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control :
4. Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order (see 41 & 42 Vict. c. 54, s. 1) :
5. Default in payment for the benefit of creditors of any portion of a salary, or other income, in respect of the payment of which any court having jurisdiction in bankruptcy is authorized to make an order :
6. Default in payment of sums in respect of the payment of which orders are in this act authorized to be made :

Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year ; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money.

Saving of
power of com-
mittal for
small debts.

5. Subject to the provisions hereinafter mentioned, and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court.

Provided—(1.) That the jurisdiction by this section given of committing a person to prison shall, in the case of any court, other than the superior courts of law and equity, be exercised only subject to the following restrictions ; that is to say,—

- (a) Be exercised only by a judge or his deputy, and by an order made in open court and showing on its face the ground on which it is issued :
- (b) Be exercised only as respects a judgment of a superior court of law or equity when such judgment does not exceed fifty pounds, exclusive of costs (repealed Bankruptcy Act, 1883) :
- (c) Be exercised only as respects a judgment of a county court by a county court judge or his deputy.

(2.) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.

Proof of the means of the person making default may be given in such manner as the court thinks just ; and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath according to the prescribed rules.

Any jurisdiction by this section given to the superior courts may be exercised by a judge sitting in chambers, or otherwise in the prescribed manner.

For the purposes of this section any court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent court to be paid by instalments, and may from time to time rescind or vary such order.

32 & 33 Vict.
c. 62.

Persons committed under this section by a superior court may be committed to the prison in which they would have been confined if arrested on a writ of *capias ad satisfaciendum*, and every order of committal by any superior court shall, subject to the prescribed rules, be issued, obeyed, and executed in the like manner as such writ.

This section, so far as it relates to any county court, shall be deemed to be substituted for sections ninety-eight and ninety-nine of the County Courts Act, 1846, and that act and the acts amending the same shall be construed accordingly, and shall extend to orders made by the county court with respect to sums due in pursuance of any order or judgment of any court other than a county court.

No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place.

Any person imprisoned under this section shall be discharged out of custody upon a certificate signed in the prescribed manner, to the effect that he has satisfied the debt or instalment of a debt in respect of which he was imprisoned, together with the prescribed costs (if any).

6. After the commencement of this act a person shall not be arrested upon mesne process in any action.

Power under certain circumstances to arrest defendant about to quit England.

Where the plaintiff in any action in any of her Majesty's superior courts of law at Westminster, in which, if brought before the commencement of this act, the defendant would have been liable to arrest, proves at any time before final judgment by evidence on oath, to the satisfaction of a judge of one of those courts, that the plaintiff has good cause of action against the defendant to the amount of fifty pounds or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, such judge may in the prescribed manner order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the court.

Where the action is for a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract, it shall not be necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England) shall be to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison.

[34 Vict. c. 17.]

An Act to make Provision for Bank Holidays, and respecting Obligations to make Payments and do other acts on such Bank Holidays.
[25th May, 1871.]

34 Vict. c. 17.

Bills due on bank holidays to be payable on the following day.

1. After the passing of this act, the several days in the schedule to this act mentioned (and which days are in this act hereinafter referred to as bank holidays) shall be kept as close holidays in all banks in England and Ireland and Scotland respectively, and all bills of exchange and promissory notes which are due and payable on any such bank holiday shall be payable, and in case of non-payment may be noted and protested, on the next following day, and not on such bank holiday; and any such noting or protest shall be as valid as if made on the day on which the bill or note was made due and payable; and for all the purposes of this act the day next following a bank holiday shall mean the next following day on which a bill of exchange may be lawfully noted or protested.

Provision as to notice of dishonour and presentation for honour.

2. When the day on which any notice of dishonour of an unpaid bill of exchange or promissory note should be given, or when the day on which a bill of exchange or promissory note should be presented or received for acceptance, or accepted or forwarded to any referee or referees, is a bank holiday, such notice of dishonour shall be given and such bill of exchange or promissory note shall be presented or forwarded on the day next following such bank holiday.

As to any payments on bank holidays.

3. No person shall be compellable to make any payment or to do any act upon such bank holidays which he would not be compellable to do or make on Christmas Day or Good Friday; and the obligation to make such payment and do such act shall apply to the day following such bank holiday; and the making of such payment and doing such act on such following day shall be equivalent to payment of the money or performance of the act on the holiday.

Appointment of special bank holidays by royal proclamation.

4. It shall be lawful for her Majesty, from time to time, as to her Majesty may seem fit, by proclamation, in the manner in which solemn fasts or days of public thanksgiving may be appointed, to appoint a special day to be observed as a bank holiday, either throughout the United Kingdom or in any part thereof, or in any county, city, borough or district therein, and any day so appointed shall be kept as a close holiday in all banks within the locality mentioned in such proclamation, and shall, as regards bills of exchange and promissory notes payable in such locality, be deemed to be a bank holiday for all the purposes of this act.

Day appointed for bank holiday

5. It shall be lawful for her Majesty in like manner, from time to time, when it is made to appear to her Majesty in council in any special case that in any year it is inexpedient that

a day by this act appointed for a bank holiday should be a bank holiday, to declare that such day shall not in such year be a bank holiday, and to appoint such other day as to her Majesty in council may seem fit to be a bank holiday instead of such day, and thereupon the day so appointed shall in such year be substituted for the day so appointed by this act.

34 Vict. c. 17.

may be altered
by Order in
Council.

SCHEDULE.

Bank Holidays in England and Ireland.

Easter Monday.

The Monday in Whitsun week.

The first Monday in August.

The twenty-sixth day of December, if a *week day*. If that be a Sunday, then the twenty-seventh. (38 Vict. c. 13, s. 2.)

Bank Holidays in Scotland.

New Year's Day.

Christmas Day.

If either of the above days falls on a Sunday, the next following Monday shall be a bank holiday.

Good Friday.

The first Monday of May.

The first Monday of August.

[37 & 38 Vict. c. 62.]

An Act to amend the Law as to the Contracts of Infants.

[7th August, 1874.]

1. All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

37 & 38 Vict.
c. 62.

Contracts by
infants,
except for
necessaries,
to be void.

2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

No action to
be brought on
ratification of
infant's con-
tract.

[45 & 46 Vict. c. 61.]

An Act to codify the Law relating to Bills of Exchange, Cheques, and Promissory Notes.

[18th August, 1882.]

45 & 46 Vict.
c. 61.

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows :

PART I.

PRELIMINARY.

Short title.

1. This act may be cited as the Bills of Exchange Act, 1882.

Interpreta-
tion of terms.

2. In this act, unless the context otherwise requires,—

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counter-claim and set-off.

“Banker” includes a body of persons whether incorporated or not who carry on the business of banking.

“Bankrupt” includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement completed by delivery.

“Issue” means the first delivery of a bill or note, complete in form to a person who takes it as a holder.

“Person” includes a body of persons whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” includes print.

PART II.

BILLS OF EXCHANGE.

Form and Interpretation.

Bill of ex-
change
defined.

3. (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.

(2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

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(3) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional.

(4) A bill is not invalid by reason—

(a) That it is not dated;

(b) That it does not specify the value given, or that any value has been given therefor;

(c) That it does not specify the place where it is drawn or the place where it is payable.

4. (1) An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

Inland and
foreign bills.

For the purposes of this act "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them being part of the dominions of her Majesty.

(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

5. (1) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee.

Effect where
different
parties to bill
are the same
person.

(2) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

6. (1) The drawee must be named or otherwise indicated in a bill with reasonable certainty.

Address to
drawee.

(2) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange.

7. (1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.

Certainty
required as
to payee.

(2) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being.

(3) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.

8. (1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

What bills are
negotiable.

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(2) A negotiable bill may be payable either to order or to bearer.

(3) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.

(4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

(5) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

Sum payable.

9. (1) The sum payable by a bill is a sum certain within the meaning of this act, although it is required to be paid—

(a) With interest.

(b) By stated instalments.

(c) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due.

(d) According to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill.

(2) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

(3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.

Bill payable
on demand.

10. (1) A bill is payable on demand—

(a) Which is expressed to be payable on demand, or at sight, or on presentation; or

(b) In which no time for payment is expressed.

(2) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

Bill payable
at a future
time.

11. A bill is payable at a determinable future time within the meaning of this act which is expressed to be payable—

(1) At a fixed period after date or sight.

(2) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.

Omission of
date in bill
payable after
date.

12. Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

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13. (1) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be.

Ante-dating
and post-
dating.

(2) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday.

14. Where a bill is not payable on demand, the day on which it falls due is determined as follows :

Computation
of time of
payment.

(1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace : Provided that—

(a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day :

(b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day.

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(2) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.

(3) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.

(4) The term "month" in a bill means calendar month.

15. The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit.

Case of need.

16. The drawer of a bill, and any indorser, may insert therein an express stipulation—

(1) Negating or limiting his own liability to the holder :
(2) Waiving as regards himself some or all of the holder's duties.

Optional
stipulations
by drawer or
indorser.

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c. 61.

Definition
and requisites
of acceptance.

17. (1) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

(2) An acceptance is invalid unless it complies with the following conditions, namely:

- (a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.
- (b) It must not express that the drawee will perform his promise by any other means than the payment of money.

Time for
acceptance.

18. A bill may be accepted—

- (1) Before it has been signed by the drawer, or while otherwise incomplete:
- (2) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment:
- (3) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

General and
qualified
acceptances.

19. (1) An acceptance is either (a) general or (b) qualified.

(2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

In particular an acceptance is qualified which is—

- (a) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated:
- (b) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn:
- (c) local, that is to say, an acceptance to pay only at a particular specified place:

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere:

- (d) qualified as to time:
- (e) the acceptance of some one or more of the drawees, but not of all.

Inchoate in-
struments.

20. (1) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit.

(2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

Provided that if any such instrument after completion is

90, 95, 97, 100, 194,
259, 341, 346

90, 95,

46 145, 346

negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

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21. (1) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto.

Delivery.

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

(2) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—

(a) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be:

(b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

(3) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

Capacity and Authority of Parties.

22. (1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

Capacity of parties.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

(2) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: Provided that—

Signature essential to liability.

(1) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name:

(2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

24. Subject to the provisions of this act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill

Forged or unauthorized signature.

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or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery, or want of authority.

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

Procurator
signatures.

25. A signature by procurator operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

Persons sign-
ing as agent
or in repre-
sentative
capacity.

26. (1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

The Consideration for a Bill.

Value and
holder for
value.

27. (1) Valuable consideration for a bill may be constituted by,—

- (a) Any consideration sufficient to support a simple contract:
- (b) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

(2) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

(3) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

Accommoda-
tion bill or
party.

28. (1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.

(2) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

Holder in due
course.

29. (1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:—

- (a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact:

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

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(2) In particular the title of a person who negotiates a bill is defective within the meaning of this act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3) A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

30. (1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

Presumption
of value and
good faith.

(2) Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

Negotiation of Bills.

31. (1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

Negotiation
of bill.

(2) A bill payable to bearer is negotiated by delivery.

(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

(4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

(5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

32. An indorsement in order to operate as a negotiation must comply with the following conditions, namely:—

Requisites of
a valid in-
dorsement.

(1) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient.

An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognized, is deemed to be written on the bill itself.

(2) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more

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indorsees severally, does not operate as a negotiation of the bill.

- (3) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.
- (4) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature.
- (5) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.
- (6) An indorsement may be made in blank or special. It may also contain terms making it restrictive.

Conditional
indorsement.

33. Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.

Indorsement
in blank and
special in-
dorsement.

34. (1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

(2). A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.

(3) The provisions of this act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

(4) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

Restrictive
indorsement.

35. (1) An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D. or order for collection."

(2) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorize him to do so.

(3) Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

Negotiation
of overdue
dishonoured
bill.

36. (1) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise.

(2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

(3) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

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(4) Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue.

(5) Where a bill which is not overdue has been dishonoured any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course.

37. Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.

Negotiation
of bill to party
already liable
thereon.

38. The rights and powers of the holder of a bill are as follows:—

Rights of the
holder.

(1) He may sue on the bill in his own name:

(2) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill:

(3) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

General Duties of the Holder.

39. (1) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

When pre-
sentment for
acceptance is
necessary.

(2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee it must be presented for acceptance before it can be presented for payment.

(3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

(4) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

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Time for pre-
senting bill
payable after
sight.

40. (1) Subject to the provisions of this act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

(2) If he do not do so, the drawer and all indorsers prior to that holder are discharged.

(3) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

Rules as to
presentment
for accept-
ance, and ex-
cuses for non-
presentment.

41. (1) A bill is duly presented for acceptance which is presented in accordance with the following rules:

(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue:

(b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only:

(c) Where the drawee is dead presentment may be made to his personal representative:

(d) Where the drawee is bankrupt, presentment may be made to him or to his trustee:

(e) Where authorized by agreement or usage, a presentment through the post office is sufficient.

(2) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—

(a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill:

(b) Where, after the exercise of reasonable diligence, such presentment cannot be effected:

(c) Where, although the presentment has been irregular, acceptance has been refused on some other ground.

(3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

Non-accept-
ance.

42. (1) When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

Dishonour by
non-accept-
ance and its
consequences.

43. (1) A bill is dishonoured by non-acceptance—

(a) when it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

(b) when presentment for acceptance is excused and the bill is not accepted.

(2) Subject to the provisions of this act when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

44. (1) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

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(2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

Duties as to
qualified
acceptances.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

(3) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto.

45. Subject to the provisions of this act a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.

Rules as to
presentment
for payment.

A bill is duly presented for payment which is presented in accordance with the following rules:—

(1) Where the bill is not payable on demand, presentment must be made on the day it falls due.

(2) Where the bill is payable on demand, then, subject to the provisions of this act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

(3) Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

(4) A bill is presented at the proper place:—

(a) Where a place of payment is specified in the bill and the bill is there presented.

(b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.

(c) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.

(d) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.

(5) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to

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pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

- (6) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.
- (7) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.
- (8) Where authorized by agreement or usage a presentment through the post office is sufficient.

Excuses for
delay or non-
presentment
for payment.

46. (1) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

(2) Presentment for payment is dispensed with—

(a) Where, after the exercise of reasonable diligence presentment, as required by this act, cannot be effected.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

(b) Where the drawee is a fictitious person.

(c) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

(d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

(e) By waiver of presentment, express or implied.

Dishonour by
non-payment.

47. (1) A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to the provisions of this act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

Notice of dis-
honour and
effect of non-
notice.

48. Subject to the provisions of this act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged; provided that—

(1) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced by the omission.

(2) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:—

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Rules as to
notice of
dishonour.

- (1) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.
- (2) Notice of dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice whether that party be his principal or not.
- (3) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.
- (4) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.
- (5) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.
- (6) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.
- (7) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.
- (8) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.
- (9) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.
- (10) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.
- (11) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.
- (12) The notice may be given as soon as the bill is dishonoured and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

- (a) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.
- (b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.

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- (13) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.
- (14) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.
- (15) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.

Excuses for
non-notice
and delay.

50. (1) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.

(2) Notice of dishonour is dispensed with—

- (a) When, after the exercise of reasonable diligence, notice as required by this act cannot be given to or does not reach the drawer or indorser sought to be charged:
- (b) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice:
- (c) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment:
- (d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

Noting or pro-
test of bill.

51. (1) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

(2) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are

discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary.

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(3) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

(4) Subject to the provisions of this act, when a bill is noted or protested, it must be noted on the day of its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

(5) Where the acceptor of a bill becomes bankrupt or insolvent, or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

(6) A bill must be protested at the place where it is dishonoured: Provided that—

(a) When a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day:

(b) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

(7) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—

(a) The person at whose request the bill is protested:

(b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.

(8) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

(9) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

52. (1) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

Duties of
holder as re-
gards drawee
or acceptor.

(2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

(3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.

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(4) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

Liabilities of Parties.

Funds in
hands of
drawee.

53. (1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this act is not liable on the instrument. This sub-section shall not extend to Scotland.

(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee.

Liability of
acceptor.

54. The acceptor of a bill, by accepting it—

(1) Engages that he will pay it according to the tenor of his acceptance :

(2) Is precluded from denying to a holder in due course :

(a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill ;

(b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement ;

(c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

Liability of
drawer or
indorser.

55. (1) The drawer of a bill by drawing it—

(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken ;

(b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

(2) The indorser of a bill by indorsing it—

(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken ;

(b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements ;

(c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

56. Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

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57. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—

Strangersign-
ing bill liable
as indorser.

Measure of
damages
against par-
ties to
dishonoured
bill.

(1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

(a) The amount of the bill:

(b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case:

(c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

(2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

(3) Where by this act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

58. (1) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a “transferor by delivery.”

Transferor by
delivery and
transferee.

(2) A transferor by delivery is not liable on the instrument.

(3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

Discharge of Bill.

59. (1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

Payment in
due course.

“Payment in due course” means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

(2) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged; but

(a) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill.

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(b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

(3) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

Banker paying demand draft whereon indorsement is forged.

60. When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

Acceptor the holder at maturity.

61. When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

Express waiver.

62. (1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.

Cancellation.

63. (1) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

(2) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

(3) A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

Alteration of bill.

64. (1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

Provided that,

Where a bill has been materially altered, but the alteration is

not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.

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(2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

Acceptance and Payment for Honour.

65. (1) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra protest*, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

Acceptance
for honour
supra protest.

(2) A bill may be accepted for honour for part only of the sum for which it is drawn.

(3) An acceptance for honour *supra protest* in order to be valid must—

(a) be written on the bill, and indicate that it is an acceptance for honour :

(b) be signed by the acceptor for honour.

(4) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

(5) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.

66. (1) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.

Liability of
acceptor for
honour.

(2) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.

67. (1) Where a dishonoured bill has been accepted for honour *supra protest*, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

Presentment
to acceptor for
honour.

(2) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for

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non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

(3) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment.

(4) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him.

Payment for
honour supra
protest.

68. (1) Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

(3) Payment for honour supra protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it.

(4) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.

(5) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party.

(6) The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payer for honour in damages.

(7) Where the holder of a bill refuses to receive payment supra protest he shall lose his right of recourse against any party who would have been discharged by such payment.

Lost Instruments.

Holder's right
to duplicate of
lost bill.

69. Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

Action on lost
bill.

70. In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

Bill in a Set.

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Rules as to
sets.

71. (1) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.

(2) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills.

(3) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of the person who in due course accepts or pays the part first presented to him.

(4) The acceptance may be written on any part, and it must be written on one part only.

If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

(5) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

(6) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

Conflict of Laws.

72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

Rules where
laws conflict.

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made.

Provided that—

(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:

(b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2) Subject to the provisions of this act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made.

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Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.

- (3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.
- (4) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.
- (5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

PART III.

CHEQUES ON A BANKER.

Cheque defined.

73. A cheque is a bill of exchange drawn on a banker payable on demand.

Except as otherwise provided in this Part, the provisions of this act applicable to a bill of exchange payable on demand apply to a cheque.

Presentment of cheque for payment.

74. Subject to the provisions of this act—

- (1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.
- (2) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.
- (3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

Revocation of banker's authority.

75. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

- (1) Countermand of payment:
- (2) Notice of the customer's death.

Crossed Cheques.

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76. (1) Where a cheque bears across its face an addition of—
(a) The words “and company” or any abbreviation thereof between two parallel transverse lines, either with or without the words “not negotiable”; or
(b) Two parallel transverse lines simply, either with or without the words “not negotiable”;
that addition constitutes a crossing, and the cheque is crossed generally.

General and special crossings defined.

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words, “not negotiable,” that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

77. (1) A cheque may be crossed generally or specially by the drawer.

Crossing by drawer or after issue.

(2) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3) Where a cheque is crossed generally, the holder may cross it specially.

(4) Where a cheque is crossed generally or specially, the holder may add the words “not negotiable.”

(5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

(6) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

78. A crossing authorized by this act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this act, to add to or alter the crossing.

Crossing a material part of cheque.

79. (1) Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.

Duties of banker as to crossed cheques.

(2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having

45 & 46 Vict.
c. 61.

been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

Protection to
banker and
drawer where
cheque is
crossed.

80. Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

Effect of
crossing on
holder.

81. Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

Protection to
collecting
banker.

82. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

31, 32,
147, 528

See amending Act p. 528

PART IV.

PROMISSORY NOTES.

Promissory
note defined.

83. (1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

(4) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

Delivery
necessary.

84. A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

Joint and
several notes.

85. (1) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenor.

(2) Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note. 45 & 46 Vict. c. 61.

86. (1) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged. Note payable on demand.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

(3) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

87. (1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable. Presentment of note for payment.

(2) Presentment for payment is necessary in order to render the indorser of a note liable.

(3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

(a) unless such presentment is waived - Joseph v. Roberts (1808) 77 L.J. N.B. 845.
~~presentment at the place of payment is not necessary.~~

88. The maker of a promissory note by making it—

- (1) Engages that he will pay it according to its tenor;
- (2) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

Liability of maker.

89. (1) Subject to the provisions in this Part and, except as by this section provided, the provisions of this act relating to bills of exchange apply, with the necessary modifications, to promissory notes. Application of Part II. to notes.

(2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

(3) The following provisions as to bills do not apply to notes; namely, provisions relating to—

- (a) Presentment for acceptance;
- (b) Acceptance;
- (c) Acceptance supra protest;
- (d) Bills in a set.

(4) Where a foreign note is dishonoured, protest thereof is unnecessary.

45 & 46 Vict.
c. 61.

PART V.

SUPPLEMENTARY.

- Good faith.** **90.** A thing is deemed to be done in good faith, within the meaning of this act, where it is in fact done honestly, whether it is done negligently or not.
- Signature.** **91.** (1) Where, by this act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.
(2) In the case of a corporation, where, by this act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.
But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.
- Computation of time.** **92.** Where, by this act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded.
“Non-business days” for the purposes of this act mean—
(a) Sunday, Good Friday, Christmas Day:
(b) A bank holiday under the Bank Holidays Act, 1871, or acts amending it:
(c) A day appointed by royal proclamation as a public fast or thanksgiving day.
Any other day is a business day.
- When noting equivalent to protest.** **93.** For the purposes of this act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.
- Protest when notary not accessible.** **94.** Where a dishonoured bill or note is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.
The form given in Schedule 1 to this act may be used with necessary modifications, and if used shall be sufficient.
- Dividend warrants may be crossed.** **95.** The provisions of this act as to crossed cheques shall apply to a warrant for payment of dividend.
- Repeal.** **96.** The enactments mentioned in the second schedule to this act are hereby repealed as from the commencement of this act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

45 & 46 Vict.
c. 61.

97. (1) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this act contained.

Savings.

(2) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this act, shall continue to apply to bills of exchange, promissory notes, and cheques.

(3) Nothing in this act or in any repeal effected thereby shall affect—

(a) The provisions of the Stamp Act, 1870, or acts amending it, or any law or enactment for the time being in force relating to the revenue :

33 & 34 Vict.
c. 97.

(b) The provisions of the Companies Act, 1862, or acts amending it, or any act relating to joint stock banks or companies :

25 & 26 Vict.
c. 89.

(c) The provisions of any act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively :

(d) The validity of any usage relating to dividend warrants, or the indorsements thereof.

98. Nothing in this act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence.

Saving of
summary
diligence in
Scotland.

99. Where any act or document refers to any enactment repealed by this act, the act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this act.

Construction
with other
Acts, &c.

100. In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence : Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation, or to find such caution as the court or judge before whom the cause is depending may require.

Parole evi-
dence allowed
in certain
judicial pro-
ceedings in
Scotland.

This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sesennial prescription.

Section 94.

Know all men that I, *A. B.* [*householder*], of _____ in the county of _____, in the United Kingdom, at the request of *C. D.*, there being no notary public available, did on the _____ day of _____ 188 _____ at _____ demand payment [*or acceptance*] of the bill of exchange hereunder written, from *E. F.*, to which demand he made answer [*state answer, if any*] wherefore I now, in the presence of *G. H.* and *J. K.* do protest the said bill of exchange.

(Signed) *A. B.*
G. H. } Witnesses.
J. K. }

SECOND SCHEDULE.

Session and Chapter.	Title of Act and extent of Repeal.
9 Will. 3, c. 17.....	An Act for the better payment of inland bills of exchange.
3 & 4 Anne, c. 8	An Act for giving like remedy upon promissory notes as is now used upon bills of exchange, and for the better payment of inland bills of exchange.
17 Geo. 3, c. 30	An Act for further restraining the negotiation of promissory notes and inland bills of exchange under a limited sum within that part of Great Britain called England.
39 & 40 Geo. 3, c. 42...	An Act for the better observance of Good Friday in certain cases therein mentioned.
48 Geo. 3, c. 88	An Act to restrain the negotiation of promissory notes and inland bills of exchange under a limited sum in England.
1 & 2 Geo. 4, c. 78 ...	An Act to regulate acceptances of bills of exchange.
7 & 8 Geo. 4, c. 15 ...	An Act for declaring the law in relation to bills of exchange and promissory notes becoming payable on Good Friday or Christmas Day.

Session and Chapter.	Title of Act and extent of Repeal.	45 & 46 Vict. c. 61.
9 Geo. 4, c. 24	An Act to repeal certain acts, and to consolidate and amend the laws relating to bills of exchange and promissory notes in Ireland, in part ; that is to say, Section two, four, seven, eight, nine, ten, eleven.	
2 & 3 Will. 4, c. 98 ...	An Act for regulating the protesting for non-payment of bills of exchange drawn payable at a place not being the place of the residence of the drawee or drawees of the same.	
6 & 7 Will. 4, c. 58 ...	An Act for declaring the law as to the day on which it is requisite to present for payment to acceptor, or acceptors <i>supra</i> protest for honour, or to the referee or referees, in case of need, bills of exchange which have been dishonoured.	
8 & 9 Vict. c. 37 in part.	An Act to regulate the issue of bank notes in Ireland, and to regulate the repayment of certain sums advanced by the Governor and Company of the Bank of Ireland for the public service, in part ; that is to say, Section twenty-four.	
19 & 20 Vict. c. 97 ... in part.	The Mercantile Law Amendment Act, 1856, in part ; that is to say, Sections six and seven.	
23 & 24 Vict. c. 111 ... in part.	An Act for granting to Her Majesty certain duties of stamps, and to amend the laws relating to the stamp duties, in part ; that is to say, Section nineteen.	
34 & 35 Vict. c. 74 ...	An Act to abolish days of grace in the case of bills of exchange and promissory notes payable at sight or on presentation.	
39 & 40 Vict. c. 81 ...	The Crossed Cheques Act, 1876.	
41 & 42 Vict. c. 13 ...	The Bills of Exchange Act, 1878.	
ENACTMENT REPEALED AS TO SCOTLAND.		
19 & 20 Vict. c. 60 ... in part.	The Mercantile Law (Scotland) Amendment Act, 1856, in part ; that is to say, Sections ten, eleven, twelve, thirteen, fourteen, fifteen, and sixteen.	

[46 & 47 Vict. c. 55.]

An Act to amend the law relating to the Customs and Inland Revenue, and to make other provisions respecting charges payable out of the public revenue, and for other purposes.

[25th August, 1883.]

46 & 47 Vict.
c. 55.

Extension of
45 & 46 Vict.
c. 61, ss. 76
to 82, and
24 & 25 Vict.
c. 98, s. 25.

17. Sections seventy-six to eighty-two, both inclusive, of the Bills of Exchange Act, 1882, and section twenty-five of the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-eight, intituled "An Act to consolidate and amend the Statute Law of England and Ireland relating to indictable offences by forgery," shall extend to any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque.

Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument.

For the purpose of this section Her Majesty's Paymaster General, and the Queen's and Lord Treasurer's Remembrancer in Scotland shall be deemed to be bankers, and the public officers drawing on them shall be deemed customers.

[55 Vict. c. 4.]

An Act to render Penal the inciting Infants to Betting or Wagering or to borrowing Money. [29th March, 1892.]

55 Vict. c. 4.

Avoiding
contract for
payment of
loan advanced
during
infancy.

5. If any infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever.

For the purposes of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan.

[55 Vict. c. 9.]

An Act to amend the Act of the eighth and ninth Victoria, chapter one hundred and nine, intituled "An Act to amend the Law concerning Games and Wagers."

[20th May, 1892.]

1. Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the eighth and ninth Victoria, chapter one hundred and nine, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connexion therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

55 Vict. c. 9.

Promises to repay sums paid under contracts void by 8 & 9 Vict. c. 109, to be null and void.

[56 & 57 Vict. c. 39.]

An Act to consolidate and amend the Laws relating to Industrial and Provident Societies.

[12th September, 1893.]

33. A promissory note or bill of exchange shall be deemed to have been made, accepted, or endorsed on behalf of any society if made, accepted, or endorsed in the name of the society, or by or on behalf or account of the society, by any person acting under the authority of the society.

56 & 57 Vict.
c. 39.

Promissory notes and bills of exchange.

66. If any officer of a registered society, or any person on its behalf, uses any seal purporting to be a seal of the society, whereon its name is not so engraved as aforesaid, or issues or authorises the issue of any notice, advertisement, or other official publication of the society, or signs or authorises to be signed on behalf of the society any bill of exchange, promissory note, indorsement, cheque, order for money or goods, or issues or authorises to be issued any bills of parcels, invoice, receipt, or letters of credit of the society, wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine not exceeding fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods for the amount thereof unless the same is duly paid by the society.

Penalty for not using name of society.

[59 & 60 Vict. c. 25.]

An Act to consolidate the Law relating to Friendly and other Societies.
[7th August, 1896.]

59 & 60 Vict.
c. 25.

Exemptions
from stamp
duty.

33. Stamp duty shall not be chargeable upon the following document:—

(a.) Draft or order or receipt given by or to a registered society or branch in respect of money payable by virtue of its rules or of this Act.

[6 Edw. 7. c. 17]

The Bills of Exchange (Crowned Cheques) Act, 1906.

1. A banker receives *payt* of a crowned cheque for a customer within the meaning of s. 82 of the Bills of Exchange Act 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving *payt* thereof.

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